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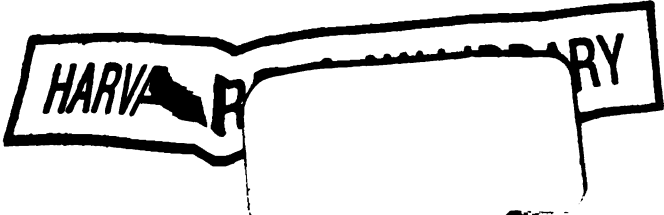
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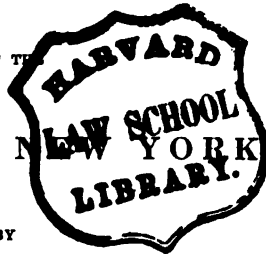
REPORTS
OF
CHANCERY CASES

DECIDED IN

THE FIRST CIRCUIT

OF THE
STATE OF NEW YORK

BY



THE HON. WILLIAM T. MCOUN,

VICE-CHANCELLOR.

~~~~~  
By CHARLES EDWARDS,

COUNSELLOR AT LAW.  
~~~~~

VOLUME IV.

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ON the thirtieth day of September, in the year one thousand eight hundred and forty-six, Vice-Chancellor M'COUN reached an age which the then Constitution made the period to judicial duties ; and, after the court had got through its work, His Honor thus addressed the Bar, (not without considerable feeling):

" Gentlemen,

I have now arrived at the end of my judicial labors.

I have disposed of all the causes, matters of petition, special motions and exceptions which were regularly before me for decision.

My task is accomplished.

During the fifteen years and an half that I have presided in this court, I have faithfully and diligently applied myself—my whole mind and energies—to the conscientious discharge of my duties. The delays that have occurred in the administration of those duties have been unavoidable.

For the very general forbearance with which the delays and my honest errors in judgment have been met and for the full measure of courtesy and respect extended towards me by the numerous members of the Bar practising in this court through my term of office, I feel proud to make my grateful acknowledgments."

While all who know Mr. M'Coun are aware that his love of truth is equal to his great desire for justice, yet the people have a gratified knowledge that he did not speak prophetically when he said, "*I have now arrived at the end of my judicial labors*": for, at their first election of judicial officers, his Honor was made a Justice of the Supreme Court of the State of New York.

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C A S E S
IN THE
VICE-CHANCELLOR'S COURT.

FIRST CIRCUIT.

WILLIAM T. McCOUN, Esq., Vice-Chancellor.

**ALEXANDER SCOTT and another v. JOHN THORP and
another.**

Where there is a reference to a master simply as to whether the complainants can cause to be made to the defendants a perfect title, clear of incumbrances, the master, in strictness, is not bound to report any thing more than that ; but it is more satisfactory that he should show how, or in what manner, the complainants could cause a good title to be made.

When a person holds a contract for purchase of real estate, and he sells the property and agrees that he will cause to be executed and delivered a good and sufficient warrantee deed, the last buyer cannot object on the ground that the title is in another ; and he will be bound to take a deed in the name of such other. This case is not within the principle making void purchases where the seller is not a *bona fide* contractor and is speculating with other persons property.

An important exhibit or document, not read but marked before an examiner, and not used on the hearing, was brought in afterwards before a master on a reference as to title, and admitted as evidence by the court.

Where a seller had not delivered an abstract of his title, and had not cleared off a judgment, he was not allowed his costs on a bill for specific performance, although he succeeded in the suit.

Both parties being considered in the wrong, on a bill for specific performance, each one had to bear his own costs, except the costs of exception to the master's report of a good title, which the vendee had to bear.

Nov. 16.
1835.

SCOTT
v.
THORP.

*Vendor
and Ven-
dee.*

*Master's
Report on
Title.*

*Evidence.
Costs.*

BILL for specific performance. The complainants held a contract of purchase, (as it afterwards appeared,) and on the strength of it, and without having had any deed of the property, ventured to sell it to the defendants, agreeing that they would cause to be executed and delivered a good and sufficient warrantee deed. The case now came before the court on the master's report of title.

THE VICE CHANCELLOR :—The exceptions to the master's report on title are not well founded. The evidence, I consider, sustains the report, though it would have been more satisfactory if the master had gone farther and shown how or in what manner the complainants would cause a good and perfect title to be made to the defendants, whether by delivery of the deed which is made an exhibit, dated the fifteenth day of June one thousand eight hundred and thirty two, executed by Willard and wife and Gardner and wife, or by some other act or deed. The order of reference, however, following the language of the agreement, only required the master to report whether the complainants could cause to be made to the defendants a perfect title, clear of incumbrances ; and, in strictness, he was not bound to report any thing more. If more should be now required, in order to enable the court to make its decree, the course would be to send the cause back to the master for further information : 1 Newland Ch. Pr. 205 ; *Gibson v. Clarke*, 2 Ves. & B. 103 ; *Anonymous*, 3 Madd. R. 495 ; *Hyde v. Wroughton*, Ib. 280.

But this seems to be unnecessary in the present case. The testimony taken before the master shows that the title to which his report refers, and on which it rests, is the title in Willard and Gardner, and that the title which the complainants could cause to be made is the same which the delivery and acceptance of that deed would confer upon the defendants. There can be no mistake on this point from the testimony, and the court is warranted in decreeing, at once, the delivery of the deed in fulfilment of the complainants' part of the agreement. The objection that the legal title was not in the complainants, and does not come through them to the defendants, is of no avail. The agreement is not that the complainants would convey to the defendants

by a deed which the complainants should execute, but that they would cause to be executed and delivered a good and sufficient warrantee deed; and it would seem to be a compliance with the contract for them to obtain a conveyance from a third person or persons directly to the defendants. Nor is this case within the principle which forbids a court of equity to interfere and compel a purchaser to take where the seller is not a *bona fide* contractor but undertakes to speculate upon the sale of another's estate. As, where a person takes on himself to contract for the sale of an estate, and is not the absolute owner of it, nor has it in his power, by the ordinary course of law or equity, to make himself so, though the owner should offer to make the seller a title, yet equity will not force the buyer to take, because there is no mutuality in the remedy, since the seller might set up, to a bill for specific performance, the impossibility of his making a title: 1 Sugden on Vendors, 9 Edit. 207. The complainants in the present case were not in that situation; though not absolute owners, yet it appears they hold a contract for the purchase of the lot in question from Gardner and previous to making the contract of sale to the defendants. They, therefore, had an equitable interest and a beneficial ownership which this court might have enforced in their behalf. Hence, they were *bona fide* contractors, and the case is not such as to show that the remedy was not mutual. It is insisted that the court cannot notice the fact of any such agreement by which the complainants were the purchasers or had any interest in the property which they undertook to sell to the defendants. The evidence of it is for the first time brought forward at the hearing on the exceptions to the master's report. The deposition of the subscribing witness to the agreement between the complainants and Gardner was taken before the examiner, and the agreement was marked and duly certified as an exhibit; but, by some inadvertence, the deposition and exhibit were not produced on the first hearing of the cause, nor before the master on the reference. The omission, however, does not preclude the complainants from the benefit of the testimony in this, subsequent, stage of the cause: *Dale v. Roosevelt*, 6 John. C. R. 256; *Higgins v. Mills*, 5 Russ. R. 287. The

1835.

SCOTT
v.
THORP.

1835.

SCOTT
v.
THORP.

court is now at liberty to take it into consideration, and to give it the same effect as evidence which it would have had if read on the former occasion. This evidence removes the objection to the complainants' right to a specific performance, although the title should be good.

The only question that remains, then, is as to the costs of the suit? Although the complainants succeed in this suit, it does not necessarily follow that they are entitled to costs against the defendants. They furnished no abstract of title previous to filing the bill. At that time too there was a judgment outstanding, which was apparently an incumbrance, and which they took no steps to remove, though they offered to leave enough of the purchase money to cover the amount. The defendants were excusable in standing out until the title could be investigated, and under the circumstances they ought not to be made to pay the costs of the suit: *Wilson v. Clapham*, 1 Jacob & W. 36. Nor do I think the defendants are entitled to costs against the complainants. The fairest ground on which to put it is that both parties have, in some degree, been in the wrong; and as to the costs of the suit generally, each party should bear their own: *Newall v. Smith*, 1 Jacob & W. 263. The defendants, however, should not have taken exception to the master's report, and the costs consequent on this step the defendants must pay. According to the stipulation contained in the order of the first day of October, one thousand eight hundred and thirty-two, by which Richard S. Williams was discharged from the sale with his costs out of the fund paid into court, the defendant must bear those costs, amounting to sixty-three dollars and sixty one cents.

Decree, overruling exceptions and confirming the master's report of title, that the title deeds and papers made exhibits before the master be delivered to the defendants as evidence of their title, and that they pay six hundred and fifty dollars purchase money and the costs of the hearing on the exceptions. The money remaining in court to be paid over on account of the purchase money and those costs.

1839.

WHITNEY and wife *v.* MONRO and others.

WHITNEY
v.
MONRO.

Executors of a will of real and personal property had filed no inventory in New York, where part of the personalty was, and one of them was controlling the estate, and a wasting of it was alleged, while their pecuniary inability was stated, and it was suggested that coercive steps were about to be taken in the surrogate's office, (where they had, however, lately given bond on application of the present complainant,) and the bill prayed that the executors be enjoined and also suspended, and a receiver appointed. *The court held*, that the surrogate had full power in the premises, and there were not such special circumstances as made it necessary for this court to interfere on the ground of having concurrent jurisdiction. Preliminary injunction dissolved.

MRS. MARGARET MONRO died in the month of March, one thousand eight hundred and thirty-seven, seized of real and personal property. And, under her will, the defendants, Henry Monro and John W. Monro, and the plaintiff, Asa Whitney, (who had married her daughter,) qualified as executors.

Jan. 15,
1839.

Jurisdiction.
Executor.
Surrogate.

The bill in this case showed that the said Henry Monro and John W. Monro became acting executors, but the property had been principally under the control and management of Henry; that the testatrix died seized of a large real and personal estate, and the said Henry Monro was in receipt of the rents and profits; that none of the executors had filed any inventory of the personalty, in the surrogate's office, nor rendered any account of the rents or profits of realty or personalty, although requested. That, from his position, the said Henry Monro was the only party capable of furnishing an inventory and an account. That there were persons holding land contracts, who required to be attended to. That the complainants' solicitor had been instructed to institute proper measures, and that such measures were about to be instituted before the surrogate to compel the filing of the said inventory, and also the rendering of the said account, and also for the purpose of having the letters testamentary issued to the aforesaid Henry and John W. Monro suspended, on the ground of their insolvency. The bill charged their pecuniary irresponsibility. That they had

1839.

WHITNEY
v.
MONRO.

collected large sums, part of the estate, and applied them to their own uses; and that they were allowing large mortgages on the testatrix's property to be foreclosed. *Prayer*, for an injunction to restrain them from paying away, parting with or changing the condition of the estate or its proceeds, and from executing any deeds; and for a decree that the said Henry Monro and John W. Monro be suspended in their office as executors; and that a receiver be appointed, and to whom should be committed the trusts of the will; and for other relief.

A temporary injunction had been granted, and a motion was now made, on bill and affidavits, to dissolve it. By the affidavit of the said Henry Monro, it appeared that an inventory had been filed in one of the counties, and an inventory, to be filed in the surrogate's office in New York, had been prepared, but that a question, as to the insertion of some stock, had kept it off the files; that the plaintiff, Asa Whitney, had received avails of the estate as well as the deponent; and that the said Asa had cited his co-executors before the surrogate of New York, (this was in December last) to give security, which they had done.

Mr. *William N. Dyckman*, for the defendants.

Mr. *E. Blachford*, for the complainants.

THE VICE CHANCELLOR :—The surrogate had full power by the revised statutes, and by the act concerning the surrogate's courts, passed May 16, 1837, § 61, to do whatever may be necessary to prevent waste of the estate; and in this instance, the surrogate of New York having exercised his authority as far as he deemed it necessary or proper, it is not for this court farther to interfere with the authority of the executors. Even if the court of chancery has concurrent jurisdiction, there are not such special circumstances in this case as to call for this court's interposition after what has taken place.

This injunction must be dissolved. Costs to abide the event.

1839.

HEWLETT
v.
HEWLETT.

LEWIS S. HEWLETT, Administrator, with the Will annexed,
&c. of CHARLES HEWLETT v. HENRY HEWLETT.

On the 5th of April, 1802, Charles H., executed bonds to Henry and Newberry H., for \$375, and \$150 payable, on the death of their mother Martha, to them or if either died without issue, to the survivor or his heirs. Charles H. died, and among his papers was found the note of Henry H., for \$310, dated 2d October, 1818, and his draft of the same date on Charles H., in favor of Newberry H.; for \$200, inclosed in a memorandum written by Charles, dated 3d January, 1829, showing \$548 due, "and to be taken, by agreement, from the bonds." Newberry H. died insolvent, indebted to Charles; but, by his death, the bonds became the sole property of Henry H. In 1818 Henry H. left this state for Baltimore, did business and failed there in 1829; took the benefit of an insolvent act in the Baltimore County Court; but did not insert these bonds amongst his assets. Martha was not then dead, but died soon afterwards. Shortly after taking the benefit of such act, Henry H. came again to this state, and sued the administrator, with the will annexed, of Charles H., on the bonds, who, believing that Henry H. would plead the statute of limitations to any set-off founded on the note and draft and not knowing that the former had gone into insolvency in Baltimore, allowed judgment to go by default. But having now got knowledge of such insolvency proceedings, he filed a bill to restrain Henry, and to have the judgments satisfied and cancelled. *The court* decreed it to be a fair conclusion that Henry, when he took the benefit of the act, considered the bonds paid and extinguished by his indebtedness on the note and draft, (which, with interest, amounted to more than the bond;) that the statute of limitations, owing to his absence, would not have availed him; that it was equitable to remember how an administrator had to act from the information of others in obtaining facts for defence; and that the complainant, administrator, was within the exception of the statute against relief from judgments. Decree as prayed for, with costs.

It will be presumed that an insolvent exhibits a just account of his debts and credits, and not that he has committed perjury or intended wrong in regard to such account.

BILL filed by Lewis S. Hewlett, as administrator, with the will annexed of Charles Hewlett, deceased, to stay proceedings in a surrogate's office which were to make him account, and have the real estate of the said Charles sold to satisfy judgments; and also, to have such judgments satisfied and cancelled.

The bill stated that two suits in debt were brought in Queen's Common Pleas, by the defendant against the complainant, as administrator, with the will annexed, of Charles Hewlett, in November term, 1830, on two bonds of Charles

Feb. 20,
1839.

Debtor and
Creditor.
Statute of
Limita-
tions.
Set-off.
Presump-
tion.
Insolvent.

1839.

HEWLETT
v.
HEWLETT.

Hewlett to the defendant and one Newberry Hewlett, payable to them or the survivor, on the death of their mother Martha. One of these bonds was dated the fifth of April, 1802; condition, for the payment of \$375, payable on Martha's death to them, or, if either died without issue, to the survivor or his heirs; and the second was dated the ninth day of September, 1802; condition, for the payment of \$150, payable in like manner as the first; judgments for the penal amounts entered by default, and notice given that executions were about to be issued to charge the complainant personally. That the complainant had sold real estate of Charles Hewlett, in Suffolk County, by order of the surrogate, and applied the proceeds as also those of the personal estate in course of administration to the payment of *bona fide* debts. That there are not assets to pay these judgments, but that there is real estate to make them secure, if they are just and to be paid. That the complainant notified the defendant's attorney that he was preparing papers for an application to chancery in the matter, when the defendant, thereupon, got an order from the surrogate of Suffolk County, calling on the complainant to pay into court the proceeds of the real estate, and to account. That, on taking out letters of administration, he advertised for all claimants on the estate of Charles Hewlett to present their claims. That the defendant did not present any. That the complainant had heard there were obligations in the defendant's favor, but not knowing their nature, he applied to the defendant and requested to see them. That the defendant would not show them, said he did not know he was entitled to them, or to anything upon them, or to that effect. That the defendant afterwards intimated he should expect something on the bonds. That the complainant then told him of his owing the estate on a note and order, which the defendant impliedly admitted, not pretending they had been paid. That the complainant, finding the defendant about to insist on the payment of the bonds, offered to submit the matters to arbitration, which the defendant refused. That the complainant objected to allow the bonds, as a subsisting debt, unless in account stated, in which the debt due to Charles's estate should be brought in, as he con-

sidered them in part, at least, cancelled by counter indebtedness. That, from the papers left by Charles Hewlett, the defendant appeared to be a debtor in a greater amount than the conditions of the two bonds, viz. a promissory note for \$310, dated Brooklyn, Oct. 2, 1818; and draft, same date, on Charles Hewlett, for \$200, favor of Newberry Hewlett. That there was a statement among Charles's papers, in the defendant's handwriting, headed thus, "*A list of debts due the following persons, viz.*" Setting forth, among others, the said Charles Hewlett and Newberry Hewlett, as his creditors, in the sum of \$548, which "list" the complainant charged was furnished by the defendant at or about the date of the note and draft. That the note and draft were inclosed in a memorandum written by Charles shortly before his death and under the solemn prospect of it; which memorandum sets forth \$548 due and to be taken, by agreement, from the bonds, (date Jan. 3rd, 1829.) That Charles, within a few days after the above date, died. That he left a wife, executrix of his will, and an only daughter as his heir. The widow renounced, and the complainant became administrator with the will annexed, under letters from the surrogate of Suffolk County. That he supposed, at first, that the defence against suits on the bond would be complete at law; but, understanding that the plaintiff therein would object the statute of limitations to the note, draft, and account so due to Charles's estate, the complainant was advised that a defence would not avail; and, to save expense, therefore he omitted to plead, expecting, however, that the said plaintiff would yield something to the equities of the case, but in which he was disappointed. That Charles and Newberry Hewlett, for years previous to January, 1823, were co-partners under the firm of C. & N. Hewlett. That in said January, 1823, Newberry died, and Charles administered on his estate under letters from the surrogate of Kings' County, dated the eleventh day of January, 1823. That Newberry was indebted to the firm and to Charles individually in a greater amount than his portion of interest in the firm. That Newberry's estate was still indebted to Charles's estate, and was, as the complainant believed, insolvent at the time of his death. That Newberry died

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without lawful issue ; and that, thereupon, the right of Henry to the bonds became absolute and exclusive as the survivor. That soon after the date of the before mentioned note and draft or order, defendant went from New York to Baltimore, in Maryland, and was there some years in business as a merchant. And the complainant had heard that he made some arrangement, or got a discharge from his creditors in Baltimore, and was enabled to return to Long Island, where he resided when the above suits were brought. That the complainant knew nothing of the nature of the discharge, or the mode of, or proceedings for obtaining it, when the suits on the bonds were brought, and was entirely ignorant thereof until after the judgments had been obtained. That, among various reports, he heard that the defendant had applied in Baltimore for the benefit of the insolvent law, and been defeated ; but not getting any information from the defendant on the subject, and not knowing but the proceedings there might bear on this case, he caused inquiries to be made in Baltimore, which, after much delay, resulted in establishing the fact that two applications were made by the defendant for the benefit of the Maryland insolvent law ; and that, upon the last, in 1829, he succeeded in obtaining it, as appeared by the record of the proceedings of Baltimore County Court, which showed that the defendant, in February, 1829, petitioned the court for the benefit of the law, setting forth, in a schedule "all his property, real, personal, and mixed, to which he is in any way entitled ;" and making oath, that such "*schedule and list of debts due him contain a true statement of all his property, real, personal and mixed, to which he is in any way entitled*, the necessary wearing apparel of himself and wife excepted." That the order specified his books, papers, accounts, *bonds, notes, and evidences of debt*. And which proceedings further set forth, that the said defendant in the said February, 1829, assigned to or assigned under said law, *not only all the property and estate mentioned in said schedule, but also "all other property and estate, real, personal, and mixed, of what kind nature or quality soever, (excepting the wearing apparel, bed and bedding of the said Henry Hewlett,) which the said Henry Hewlett has or*

claims any title to or is in any respect entitled to, in possession, remainder or reversion ;” and that a discharge was, thereupon, granted to the defendant by the court, at its October term, 1829. That Charles Hewlett was nowhere mentioned as a debtor in these papers or defendant's debtor on these bonds or otherwise, and no claim on him was pretended to be conveyed to the assignee. That the bonds had been shown to the complainant; that they were without any assignment or the appearance of any having ever been made. The bill charged that it was agreed between the complainant and the defendant, after Newberry's death and the date of the note and order, that the account should be off-set against the bonds. That the defendant so understood it, and that this only can explain his omitting the bonds in his schedule at Baltimore. That, in suffering defaults in the suits, he supposed that the account of off-set would be excluded by the statute. That he did not get a knowledge of his defence from Baltimore until after the defaults. That the proceedings at Baltimore are, as he charged, a good defence. That Henry's proceeding in the suits against his own knowledge and presuming on the complainant's ignorance made the judgments fraudulent. *Prayer :* That the defendant be enjoined from requiring the complainant to account before the surrogate of Suffolk County; and that the bond be given up and cancelled, and satisfaction entered of the judgments; that the defendant pay costs; and for general relief.

The defendant, by his answer, admitted notice of intention to issue executions; but none issued; admitted sales of some of Charles's estate, but was ignorant how it was ever applied by the complainant in payment of debts. Admitted that some real estate was unsold, but whether sufficient to ensure payment of judgments, he could not answer. Admitted obtaining order from the surrogate of Suffolk County. Believed advertisement by complainant, as administrator, was published, but never having seen it, did not admit publication. Heard of it eight or nine months after Charles's death. Could not say whether before or after advertisement he presented his claim; but before presenting his claim, he wrote to the complainant respecting the bonds.

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Denied any recollection of the complainant's applying to him respecting the bonds, or of his refusing to show them, or of using the words charged; or if so, it was before Martha Hewlett's death, and while the bonds were in the hands of Richard S. Williams. Says that he did exhibit the bonds to the complainant, and claimed the whole amount. Denied that the complainant informed him that he was indebted to Charles Hewlett's estate, or alluded to the note or order. Admitted that an arbitration was offered, and declined, as occasioning delay. That the complainant refused to pay to his attorney, on the ground of set-off. As to the paper showing his indebtedness to Charles's estate, which have come to the complainant's possession, he knew nothing except from the bill. Admitted that in 1818, he owed Newberry \$510; that, to satisfy the same, he gave Newberry a note for \$300, and a draft on Charles for \$210, given at Brooklyn. That Charles, at the time, owed the defendant \$330, and agreed to pay the amount of the draft to Newberry. C. & N. then in partnership; alleged that the note should have been given to Newberry alone, but it was done in a hurry. That Newberry receipted for the note and draft, sets forth copy, dat: 2d Oct., 1818. Admitted the statement of the debts made by him, that it was previous to giving the note, and that he supposed the \$510 was due C. & N., for moneys advanced by the firm; but Newberry said, in Charles's presence, and by him assented to, that the money was advanced by Newberry alone. That the \$548 in the statement was liquidated at \$510. Denied a promise within six years, and claimed the benefit of exception as if pleaded. Knew nothing of the memorandum left by Charles, except from the bill. Admitted Charles's will; renunciation by widow; and administrationship granted to the complainant. Did not know what influenced the complainant not to plead to the suits. Admitted that a compromise was suggested, but that it was rejected, because enough was not offered. Corrects the alleged date of Newberry's death, from 12th Jan. 1823, as stated in bill, to 1821. Did not know that Charles took out letters of administration on Newberry's estate; nor, whether Newberry was indebted to the firm or to Charles. That New-

berry had real estate, and Charles occupied it at Cold Spring, worth \$3000; enough, he considered, to pay his debts. That Newberry died intestate, and the defendant, as survivor, thereupon became solely entitled to the bonds, under their condition. That in the latter part of 1818, he went to Baltimore; became embarrassed in business there; applied twice for a discharge under the insolvent law there; last time, in 1829; in March, 1829, he obtained discharge, and he returned to Long Island. Did not know if the complainant was ignorant of it; never kept it a secret. It was generally known among his friends, and thought the complainant must have known it before the suits were brought. Did not know of the plaintiff's sending to Baltimore, nor the information he got there; was never defeated in his application there. Admitted his petitioning in Baltimore court, and the proceedings and record as set forth. Admitted that Charles was not named as a debtor; nor were the bonds included in the assignment or schedule. That Martha Hewlett was not dead, and the bonds were not in his possession at Baltimore, having been left with Newberry, and on his death, they passed into the possession of a Mr. Rhodes, where they remained until his return aforesaid from Baltimore, (March, 1829,) when he placed them (as collateral security,) in the hands of R. S. Williams. That if "bonds" is a word used in the assignment, it is a mistake. No property whatever went to the assignee, except what is mentioned in schedule. Admitted that no indorsement or assignment was ever made of the said bonds, nor is there any appearance of such. Denied any understanding or agreement with Charles to off-set. Denied that he considered nothing due on the bonds. Denied motives imputed in bill for omitting bonds in schedule. Did not know under what impression the complainant suffered judgments against him on the bonds, but denied his right to bring the defendant into this court, and craved benefit of exception as though he had demurred or pleaded. That he was advised by counsel that the proceedings in Maryland would not have been a defence at law. Denied that he has taken advantage of the complainant's ignorance, or that the judgments were recovered by fraud.

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The case came before the court, on pleadings and proofs ; but the above abstract of the former, and the reference to the latter to be found in the opinion of the Vice-Chancellor, will be sufficient to understand the merits.

Mr. *J. M. Ely*, for the complainant.

Mr. *John Greenwood*, for the defendant.

Oct. 7. THE VICE-CHANCELLOR :—The amount of the defendant's indebtedness to C. & N. Hewlett, as evidenced by the list of his debts in his own handwriting, and by the note and draft of the twenty-sixth day of October, one thousand eight hundred and eighteen, which were in the possession of Charles Hewlett, the intestate, at the time of his death, are more than sufficient to absorb the whole amount of the two bonds, payable by Charles Hewlett, at the death of Martha Hewlett, which took place in the year one thousand eight hundred and twenty-nine, there being no interest accruing on the bonds during her lifetime. Taking the note and the draft as the basis of calculation, namely, five hundred and ten dollars, which the defendant admits he owed to Newberry Hewlett, and which he does not pretend he has ever paid, and adding interest for ten or eleven years, they exceed the amount of the bonds. But the question is, whether this indebtedness could be permitted to operate or be available to Charles Hewlett, if he were living, or to the complainant as his representative by way of set-off or extinguishment of the bond debts ? If the indebtedness was to the partnership or firm of C. & N. Hewlett, then Charles Hewlett, as surviving partner, could have made a set-off of the demand against his individual debt on the bonds : Collyer on Part. 448. If to Newberry individually, then, as administrator of Newberry, Charles could not make it a set-off against his own debt. The papers would seem to import on their face, that the indebtedness originally set down at five hundred and forty-eight dollars, was to the partnership of C. & N. Hewlett ; and that, by the note and draft, three hundred dollars of it remained so, and two hundred and ten dollars became due and payable to New-

berry solely. But, however the fact might be and whatever the difficulties in the way of the complainant, if this case stood upon the right of set-off strictly in Charles Hewlett, I think there is but one conclusion to be formed, and that is the most charitable one for the defendant—that, in the year one thousand eight hundred and twenty-nine, when he proceeded to take the benefit of the insolvent act in Maryland, he considered these bond debts paid and extinguished by the money which he had for many years owed to his brothers, Charles and Newberry or one of them and which Charles had had the entire control of since the death of Newberry, in the year one thousand eight hundred and twenty-three. Charles likewise considered Henry's indebtedness as applicable, by his consent, to the extinguishment of the bonds, as is evident from the memorandum which he left behind him as a testimony of his understanding on the subject, and which he made shortly before and in anticipation of his approaching end. It is proved that Henry had the bonds with him in Baltimore, some short time previously, and he knew that he alone could claim the payment of them, and that if any thing was due upon the bonds, or should become due, that he would be entitled to receive it; and yet, in the statement of his property and effects under oath, he omitted to mention it and virtually declared that no such property belonged to him. He, indeed, goes further, and, in his list of creditors, makes no mention of C. & N. Hewlett or either of them as creditors. This omission can only be accounted for on the ground that he considered their mutual indebtedness cancelled; that he neither owed C. & N. Hewlett upon the note and draft, nor did Charles Hewlett owe him upon the bonds. It is in vain for him to say the bonds were not yet debts; or only choses in action, or not property inasmuch as Martha Hewlett was then living. They were instruments which created a debt *in presenti*, though *solvendum in futuro*, and he had succeeded to them, and they had become his property on the death of his brother Newberry some six years before, and he was bound to include them in his list of credits or inventory of his estate, so that his creditors might have the benefit of them; and he was also bound to repre-

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sent C. & N. Hewlett, or one of them among his creditors, unless, indeed, these cross-demands were compensated by each other and discharged. We cannot presume, that, in his insolvent proceedings, he committed perjury or intended wrong. On the contrary, it must be presumed that he exhibited a just and true account of his debts and credits: *Gresley's Eq. Ev.* 368. His omission to mention the bonds at that time precludes him from setting them up afterwards as subsisting debts. Nor could he be permitted to avail himself of the statute of limitations as a bar to the simple contract debt which he owed to C. & N. Hewlett. He says, in his answer, that immediately after giving the note and draft in October, one thousand eight hundred and eighteen, he removed to Baltimore, where he resided until his discharge, in one thousand eight hundred and twenty-nine, when he returned to this state. During that period of eleven years, our statute did not run against creditors of his residing in this state. After his return, only about two years elapsed when the bill in this cause was filed for relief. Setting up the statute, therefore, in bar and claiming the benefit of it in his answer, can be of no service or protection to him.

But another question is made, whether the complainant is entitled to any relief in this court, after suffering judgment to be taken against him, by default, in the court of law upon the bonds? It must not be forgotten that the complainant is an administrator, acting, not upon his personal knowledge so much as upon the information of others which he might be able to collect, from time to time, in regard to the matters of defence, if any, which he might be able to make at law. He avows his ignorance of the defendant's insolvent papers and proceedings, until it was too late for him to interpose a plea. Besides, if he had undertaken a defence, it is doubtful whether, upon the technical rules of law, he could have made a set-off or insisted on an extinguishment of the bonds. He might, after all, have been obliged to seek equitable relief; and I think the complainant is fairly within the exception of the rule against granting relief after judgment, where the party has omitted to make a defence, as admitted in several of the cases:

VICE-CHANCELLOR'S COURT.

17

Lansing v. Eddy, 1 J. C. R. 51; *Smith v. Lowry*, Ib. 323;
Barker v. Elkins, Ib. 466.

The complainant is entitled to the decree which his bill prays for, with costs.

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v.
ANDERSON.

PURSER v. ANDERSON and others.

Although a mortgage may have been paid, yet, on a valuable consideration, it may be kept alive for other purposes where the rights of creditors and third persons have not intervened; but, although the mortgagor and mortgagee, after payment, may thus resuscitate it as between themselves, yet an assignment of it, after another mortgage by the same mortgagor is executed and recorded, will not override the latter. Nor will it have that effect as against an assignment for creditors (by the same mortgagee) also executed and recorded prior to such assignment of the resuscitated mortgage. Here is something tantamount to notice and more than a latent equity.

QUESTION as to who was entitled to surplus monies in court. A reference was had to ascertain priorities. The surplus had come out of real estate in Henry street, New York; and the claimants, on the reference, were George Rapelye and De La Fayette Schanck. The former claimed as holder and assignee of a bond and mortgage dated the eighth day of December, 1836, for three thousand dollars, on the said premises, made by John Anderson to Robert Anderson; while the latter claimed as assignee of a bond and mortgage made by John Anderson and wife to Elisha Conover.

April 25,
1839.

Mortga-
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Notice.
Latent
equity.

On the reference, the testimony was somewhat variant as to the particular consideration for the bond and mortgage from John Anderson to Robert Anderson. William Patterson deposed, "I have heard John Anderson say that he had given a mortgage for three thousand dollars to Robert Anderson on the house John lived in, in Henry street, as security for a borrowed note for three thousand dollars. I understood him it was a joint note drawn by Robert Anderson and David Anderson senior. I think he used the terms, 'My brother Robert and my uncle David.' This conversa-

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tion was either in the latter part of March or the beginning of April, 1837. He said he had negotiated the said note on the Seventh Ward Bank. He said, the note had then been paid, and by him the said John." And the teller of the bank proved the discounting to and payment by John Anderson of the note. And it was proved that Robert Anderson had admitted that the bond and mortgage to him was given to secure the endorsement of the note in the Seventh Ward Bank. John Anderson was examined on the reference, and appeared to give the idea that this bond and mortgage was made to secure money owing to his brother Robert:—"It was given for money I then owed him; but I told him that my note for three thousand dollars should be taken up when it fell due. He was endorser on said note. I think the note was given about the same time with the mortgage." It appeared that on the twenty-second day of March, 1837, Robert Anderson had assigned this mortgage (with the bond accompanying the same) for a valuable consideration to George Rapelye. But it was also proved that, in the month preceding, say on the fifteenth day of April, 1837, the said John Anderson and wife had executed a bond and mortgage on the same premises to Elisha Conover, for securing two thousand dollars, to satisfy part of a dishonored note of John Anderson; and that the said Elisha Conover had assigned the bond and mortgage to De La Fayette Schanck on the seventeenth day of June, 1837. It also appeared that this mortgage and its assignment were both recorded before Rapelye took an assignment of the mortgage from John to Robert Anderson. It also appeared that, on the seventeenth day of June, 1837, John Anderson had executed an assignment for the benefit of creditors. This, also, was recorded before the assignment of mortgage to Rapelye.

The master reported that the mortgage by John to Robert Anderson was given as a security for a note for \$3,000, dated on or about the nineteenth of December, 1836, drawn by David Anderson, the uncle of Robert Anderson and John Anderson, and endorsed by Robert Anderson for the accommodation of John Anderson, and discounted by the Seventh Ward Bank to the credit of John Anderson, and which was taken up by him on the twenty-second of March 1837, when

it became due, and not for any antecedent debt due from John to Robert Anderson ; and became void on the payment of said note, and remained null and void and was not a lien on the said surplus monies, although the assignee, the said George Rapelye, might have purchased the same for a *bona fide* consideration and without notice of anything to invalidate it.

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v.
ANDERSON.

Exceptions were taken to the report by George Rapelye.

Mr. *Benjamin Haight*, in support of the exceptions.

Mr. *D. M. Cowdrey*, for De La Fayette Schanck.

Mr. *James R. Whiting*, for the assignees of John Anderson.

THE VICE-CHANCELLOR :—The evidence is contradictory as to the consideration of the bond and mortgage between John Anderson and his brother Robert, which the latter assigned to Rapelye, who now claims to receive payment of it out of the surplus money in this court. But I consider the preponderance is decidedly in favor of the supposition that the bond and mortgage were given to secure Robert and their uncle David against the note which they had made, for John's accommodation, to be discounted at the Seventh Ward Bank ; and that, when John paid that note, as it appears he did, the specific purpose for which the bond and mortgage had been given was satisfied.

Dec. 27.

After this, however, it was still competent for the parties, John and Robert, to keep the bond and mortgage alive for any other purpose founded on a good or valuable consideration, provided the rights of creditors or third persons did not intervene. It is attempted to be shown that another indebtedness of John to Robert did exist, which served as a consideration, but the evidence falls short of proving the fact in a satisfactory way, either as to the actual indebtedness or the amount for which Robert should hold it as security ; and it could not be held as against John's creditors for the benefit of his family. Upon the whole, therefore, the conclusion must be, that on payment of the note at the bank,

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the bond and mortgage were satisfied and became a dead letter in the hands of Robert.

Such being the condition of the bond and mortgage, could it be assigned so as to be of any effect or avail in the hands of the assignee?

With the assent and concurrence of the mortgagor, it could be assigned, and in the hands of an assignee for value it would be available as against the mortgagor and mortgagee. In the present case, the mortgagee has covenanted, in the assignment, that the money mentioned in the mortgage was due upon it; and John Anderson, the mortgagor, appears to have been ready, at all times, to admit the mortgage to be a subsisting security and to concur in the assignment—and Mr. Rapelye having actually paid value for it, I see no difficulty in considering the bond and mortgage as a valid and subsisting security in his hands as against these parties.

But the question is, whether it is so as against third persons who claim adversely to him? Before Rapelye paid his money and took the assignment, John Anderson gave a mortgage to Conover; and, then, assigned his equity of redemption for the benefit of his creditors. When Conover took his mortgage, he understood the preceding mortgage to Robert Anderson was satisfied and no longer an incumbrance, and it was not competent for John and Robert, afterwards, to revive a defunct mortgage to the prejudice of Conover's security. So, after executing the assignment for the benefit of his creditors, it was not competent for John Anderson to defeat the benefit of it to them, by consenting to the setting up of this former incumbrance. The Conover mortgage and the assignment for creditors were both on record anterior to Rapelye's purchase and the payment of his money. He is, therefore, chargeable with notice of them; and if he had inquired of Conover or the assignees, he might have ascertained whether they claimed in opposition to or in subordination of the mortgage he was about to purchase. If they had admitted that they claimed subject to it as a subsisting incumbrance, he would have been safe in becoming the assignee. But if they had objected, as they do now, he could not have made the purchase, except at the risk of being defeated by them. There was enough to put

Rapelye on this inquiry ; and it is tantamount to notice to him that they would dispute the validity of the mortgage. He is not, therefore, to be regarded as a *bona fide* purchaser without notice.

The equity set up by the holder of the Conover mortgage and by the assignees, to a preference, is not a latent equity which Rapelye could not know or guard himself against ; and he is not entitled to the benefit of the rule on that subject as laid down by the judges in *James v. Morey*, 2 Cowen's R. 246.

I am of opinion that the master has reported correctly on the subject of the claims to the surplus ; and the exceptions to the report must be overruled, with costs of the exceptions and hearing to be paid by George Rapelye. Each party may be left to bear his own costs of the reference.

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DEWEY
v.
ADAMS.

DEWEY and another v. ADAMS and others.

Where an assignment for creditors is had, and the assignees let furniture (embraced by it) on a rental to one of the assignors, until a favorable time for sale, the assignment will be void as to this, for want of a change of possession.

JUDGMENT Creditor's Bill. The defendants, Adams and Welsh, had made an assignment for the benefit of creditors. Part of their properties consisted of the furniture of an hotel known as Knickerbocker Hall. The complainants insisted that there had been no change of possession. The defendant Welsh had remained in possession of the furniture in the sleeping apartments in Knickerbocker Hall, until the filing of the bill ; and it appeared that the assignees had let the same to him at a rent of \$125 per month ; and they alleged that they had kept it on hand so that, in the fall of the year, it could be sold to advantage.

May 8,
1839.

Debtor and
Creditor.
Fraud.
Possession.

THE VICE-CHANCELLOR decided that the assignment was void as to the furniture in the lodging rooms in Knickerbocker Hall, which were left in Walsh's possession on rent :

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v.
DIMOND.

there not having been a sufficient change of possession ; and his honor directed the property to be delivered to a receiver.

Mr. *D. Marvin*, for the complainants.

Mr. *E. Sandford*, for the defendants.

LOVETT v. DIMOND, RACEY, &c.

Where a bond and mortgage are unimpeached by the parties to it, an after-purchaser of the premises (covered by the latter) cannot affect their amount on the ground that the mortgagee has sold and assigned them at a less amount than is secured by them.

A note given for interest is not payment.

An assignor of a mortgage taking, from after purchasers who buy subject to the mortgage, an additional security and amount for forbearance, will not, thereby, invalidate the original security for usury ; but, on foreclosure, he will have to give credit for such addition.

July 30,
1839.

Mortga-
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Mortga-
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Assign-
ment.
Assignor.
Usury.

FORECLOSURE. Bill filed by the complainant, George Lovett, as assignor of a mortgage of real estate, for ten thousand dollars, made to secure part of purchase money. The property was bought by the defendant, Elizabeth Racey, as trustee for a Mrs. Curtis, subject to the mortgage. It will be gathered, by the opinion of the court, that George Lovett purchased the mortgage at an under price ; and that, thereafter, something was received by him for forbearance. The question was, as to the effect of these things upon the validity of the security.

Mr. *Peter A. Cowdrey*, for the complainant.

Mr. *T. R. Lee*, for Mrs. Racey and Mrs. Curtis.

THE VICE-CHANCELLOR :—The defendant, Mrs. Curtis, for whom Mrs. Racey holds the title of the mortgaged premises as trustee, purchased the same in September, one thousand eight hundred and thirty-five, subject to the incum-

brance of the mortgage for ten thousand dollars, which was then a valid and subsisting incumbrance to that amount. In October, one thousand eight hundred and thirty-six, the complainant purchased the bond and mortgage of Daniel B. Talmadge, and took an assignment of them. No matter what the complainant paid: his title is not disputed by any body who had an interest in the bond and mortgage; and there could be no usury in the transaction to affect the original validity of the securities on which these defendants can have any right to set up. It is immaterial to them for how much less than the face of the bond and mortgage the complainants bought them up. As to the defendants, the bond and mortgage stand good for the amount due when they purchased, except so far as payments have been made since by or on behalf of these defendants. There must be a reference to a master to compute the amount due; and in making the computation, the defendants will be entitled to a credit of three hundred dollars, on account of the interest for which James L. Curtis's promissory note was given, unless the complainant produces and surrenders the note and shows that it has never been paid. If paid in part, so much is to be credited on the surrender of the note for the residue.

In June, one thousand eight hundred and thirty-seven, on granting a forbearance of payment, the complainant had no right to stipulate for fourteen *per cent.* interest; and all that he could exact, if he thought proper to extend the time for payment, would have been to advance the rate of interest from six to seven per cent. from that time. If the master shall find that it was within the scope of the defendant's agreement to pay seven per cent. from that time, he may charge the interest at seven per cent. after that period; and the defendants will be entitled to a credit of the fourteen hundred dollars for which Curtis's note and the collateral security of a mortgage was given, as so much paid for interest money, unless it appears that such amount has not been realized by the complainant and he shall think proper to surrender the note and the security which accompanied

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LOVETT
v.
DIMOND.

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DIMOND.

it. . On the coming in and confirmation of the master's report, he may proceed and sell.(a)

(a) In an after case of foreclosure, (12th November, 1839, *Same complainant against Hall and others*,) a mortgage had been given to secure a note; and the principle in the text was again carried out.

THE VICE-CHANCELLOR:—The usury alleged in the answer can have no influence upon the note of two thousand and thirty-five dollars and sixty cents, which the assignment of the mortgage was intended to secure. Although this note was included in the settlement of the sixteenth day of January, one thousand eight hundred and thirty-nine, when the usurious extortion for forbearance was demanded and taken by the complainant, yet he was permitted to hold the original note and the securities upon which he now proceeds; and I suppose this court cannot interfere with his right to impose payment of that note out of the mortgaged premises. The complainant demands nothing more by his bill in this cause. There must be a reference to a master to compute the amount due on the note of two thousand and thirty-five dollars and sixty cents; and in making the computation, the master must allow the defendant Hall a credit for all monies paid either for principal or interest, or for forbearance, which may appear to be fairly applicable to this note. The cause must be set down for hearing on the master's report; and all further directions are reserved.

1839.

MORRISON
v.
MOAT.

MORRISON and others v. MOAT and others.

The defendants had, through newspapers, misrepresented the decision of the court in relation to a modification of an injunction as well as the views expressed by the Vice-Chancellor in making the decision; but, as the court considered the misconduct hardly came under criminal contempts, (R. S. 278, § 10, 11,) and it was not clear that it amounted to an act by which the rights or remedies of the complainants might be defeated, impaired, impeded or prejudiced (2 R. S. 534,) and as the defendants made a reasonable explanation, the court allowed the defendants to go free.

THE bill had been filed to restrain the vending of simulated pills, as Morrison's pills; and, on a motion to dissolve the injunction, it had been materially modified. At the time the injunction was granted, the complainants advertised the issuing of it; and when it was so modified the defendants also advertised such modification, but accompanied it with misrepresentations as to what the court had said and decided. A motion was now made, on behalf of the complainants, for the defendants to show cause why they should not be punished for contempt.

October 9,
1839.

Practice.
Contempt.

Mr. *Bates*, for the complainants.

Mr. *Bixby* and Mr. *Charles Edwards*, for the defendants.

THE VICE-CHANCELLOR:—This is not a proceeding for the purpose of punishing the defendants for a criminal contempt under 2 R. S. 278, § 10, 11. None other than the acts there enumerated can be thus punished, and what is alleged against the defendants hardly amounts to "the publication of a false or grossly inaccurate report of its proceedings." For such an offence, the fine imposed would not go to the party, but to the state. Here, the object is to remunerate the party in the cause for an injury to his civil rights or remedy by the defendant's misconduct, and the proceeding is taken with that view under the 2 R. S. 534—the affidavits and papers being entitled in the civil suit. In the circular written and sent to their agents throughout the

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MOAT.

country, the defendants have, most certainly, misrepresented the decision of the court in relation to the injunction and the views expressed by the Vice-Chancellor in making that decision. But the question is, whether this is a piece of misconduct by which the rights or remedies of the complainants may be defeated, impaired, impeded or prejudiced in any of the cases enumerated in the statute? It is not easy to perceive how or in what way the rights or remedy of the complainants are affected by this act of the defendants. They disavow any intentional contempt and disrespect towards the court. Their object in sending out the circular was to counteract the injurious effect which the complainant's publication of the injunction had produced. They felt themselves aggrieved by the publicity and circulation given to the injunction as it was granted in the first instance, and this may serve to excuse, though not justify the defendants in the course they have taken on the modification of the injunction. The order calling on the defendants to show cause may be discharged; and, under all the circumstances, without costs to either party as against the other.

1839.

BURR v. STANLEY.

BURR
v.
STANLEY.

A tender of principal and ten per cent. interest under the act of the 12th May, 1837, allowing redemption under sales of mortgaged premises, will not save ordinary interest (7 per cent.) from time of tender, where it does not appear that the amount of such tender has been lying idle.

UNDER the act entitled, "An act concerning the sale of real estate by mortgage," passed 12th May, 1837, which allowed redemption of mortgaged premises within one year from the day of sale, on payment to the purchaser of the amount bid, together with interest at ten per cent. per annum from the time of sale, the complainant, Aaron C. Burr, claimed to redeem from the defendant, Joseph C. Stanley, who had purchased the premises under foreclosure at master's sale, on the fifteenth day of May in the year one thousand eight hundred and thirty-seven. It appeared that Burr went to the latter, explained to him that he was entitled to the equity of redemption, and had obtained the money and was then ready and willing to redeem the premises in this suit under and by virtue of the aforesaid law, but that the said Stanley would not recognize him and refused it; and that he went again, with witnesses, and tendered him the money (\$2850 principal, with \$285 interest at ten per cent.) which was again refused—that this was on the fifteenth day of May one thousand eight hundred and thirty-eight. The bill was taken as confessed; and a reference was had to ascertain the amount which the defendant had disbursed and received on account of the premises and the times of receipts and disbursement, and what sum the complainant ought to pay to the defendant in redemption, and whether the defendant was entitled to the rents during one year from the time of sale over and above the ten per cent. and also whether the defendant should be allowed his other expenses and disbursements. The master, Mr. Philo T. Ruggles, found that the defendant had disbursed, on account of the premises, one hundred and thirteen dollars and seventy-five cents, (for retainer fee, abstract of title, insurance, re-

October 12,
1839.

Mortgage.
Redemption.
Tender.
Interest.

1839.

BURR
v.
STANLEY.

gistering deed, painting and repairs) and had received, on account of rents, the sum of five hundred and twenty-seven dollars and fifty cents; and the said master did report that the complainant ought to pay to the defendant the sum bid at the sale at the rate of ten per cent. per annum for one year and up to the fifteenth day of May, one thousand eight hundred and thirty-eight, and interest thereon at the rate of seven per cent per annum from the said last mentioned day up to the date of the report, after deducting the said rents received by the said defendant since the first day of May in the same year and interest thereon, which sum, in redemption, amounted to \$3138 38. Also the said master found that the defendant was entitled to the rents from the fifteenth day of May one thousand eight hundred and thirty-seven in addition to the ten per cent.; but that he ought not to be allowed his said disbursements, amounting to one hundred and thirteen dollars and seventy-five cents.

The complainant excepted to the report.

Mr. *A. Benedict*, for the complainant.

Mr. *John Slosson*, for the defendant.

THE VICE-CHANCELLOR :—These exceptions to the master's report are not warranted; and it must be confirmed. The complainant will have to pay for redemption the two thousand eight hundred and fifty dollars and the ten per cent. interest, two hundred and eighty-five dollars, as tendered, with interest on the two sums since the fifteenth day of May one thousand eight hundred and thirty-eight, inasmuch as the complainant has not shown that the moneys have been lying idle since the tender. The complainant is, then, entitled to the rents from May, one thousand eight hundred and thirty-seven,^(a) or the fair yearly value, less repairs and taxes, with interest on the quarterly payments from the time when received or when they ought to have been received. The complainant is also entitled to his costs of the suit, except the costs on the exceptions to the master's report. The

(a) See *Ruckman v. Astor*, vol. 3, p. 373.

costs occasioned by the exceptions the defendant is entitled to against the complainants, to be taxed and set off.

1839.

SCUDDER
v.
VAN AMBURGH.

SCUDDER v. VAN AMBURGH and others.

*It would seem that the filing of a judgment creditor's bill is a constructive notice of *lis pendens*, sufficient to affect a purchase of the debtor's furniture made *pendente lite*.*

A party who claims as a purchaser without notice must set it up by answer or plea, and cannot avail himself of it by a demurrer to a pleading which explains and goes against the purchase.

JUDGMENT creditor's bill; and where a supplemental bill had been filed to reach furniture that had belonged to the judgment debtor, and sold by him to the defendant, Isaac Van Amburgh, *pendente lite*. No receiver had been appointed. The question was, on the effect of the filing the bill as a notice. The defendant, Van Amburgh, interposed a demurrer.

Oct. 23,
1839.

Debtor and
Creditor.
Lis pendens.
Purchaser without notice.
Pleading.
Demurrer.

Mr. H. F. Clark, in support of the demurrer.

Mr. Livermore, for the complainant.

THE VICE-CHANCELLOR:—I am inclined to think that the *lis pendens* operated as a constructive notice to the defendant, Van Amburgh, when he claims to have purchased and paid for the furniture, and that he cannot hold it against the judgment creditor of Tysen, his vendor, who had, at the time, acquired at least an equitable lien upon it from the moment of filing his bill in this court. But, without expressing a definite opinion on this point, which, perhaps, is not a decided one: *Murray v. Lilburn*, 2 J. C. R. 444, I am of opinion that if the defendant, Van Amburgh, would claim to be a *bona fide* purchaser without notice, he must set up the fact by answer or plea, and cannot avail himself

1839. of it on a demurrer to this supplemental bill: *Galatian v. Erwin*, Hopk. 48; S. C. 8 Cowen's R. 361.

PLET
v.
BOUCHAUD. Demurrer overruled, with costs; and defendant is to answer within twenty days.

PLET v. BOUCHAUD.

The staleness of a known demand, creates a suspicion against it. Where a principal witness has promoted a stale claim (eleven years old) and his hostility to the defendant is apparent, his testimony will be far outweighed by an answer fairly responsive to the bill.

Nov. 26,
1839.

Debtor and
Creditor.
Stale De-
mand.
Evidence.
Witness.

LOUIS PLET, a colored man and the father of the complainant, had had business transactions with the defendant, Joseph Bouchaud; and in the year one thousand eight hundred and twenty-two, a settlement of accounts took place between them. Louis Plet died in the year one thousand eight hundred and twenty-three, and devised whatever estate he possessed to Jane Rose, who had been induced to assign all claim and right in the matter embraced by this suit to the complainant. The complainant insisted that, when there was such settlement, the defendant took certain property coupled with a trust; and the former claimed an accounting. The defendant, in his answer, set up the settlement in 1822, and that Louis Plet surrendered the possession and all further claim to such property; this was particularly set forth in the answer.

It appeared that one Dias (who had had litigation with the defendant Bouchaud) was the originator of the present suit, and the main witness; and from the course the evidence took, witnesses had to be called to sustain his general character for veracity.

The case came before the court on pleadings and proofs.

Mr. John Greenwood, for the complainant.

Mr. *Edward Sandford*, for the defendant.

1839.

PLET
v.
BOUCHAUD.

THE VICE-CHANCELLOR :—The main point in this case is, whether the relation of debtor and creditor or mortgagor and mortgagee continued after the year one thousand eight hundred and twenty-two. The delay to assert this claim from the death of Louis Plet in one thousand eight hundred and twenty-three, until one thousand eight hundred and thirty-four, when the bill was filed, rendering it a stale demand, is, of itself, suspicious. It is in vain for his representatives to say they were not aware of it, since the members of his family have endeavored to prove the dying declarations of Louis Plet, that he had been wronged by the defendant who justly owed him some thousands of dollars. And the suspicion of its being a mere experimental suit is much strengthened, when the manner in which it has been got up, and motive and instigations are considered. It is very evident but that for Mr. Dias and his hostility of feeling towards the defendant, the suit would never have been heard of. He is, confessedly, the promoter of this litigation in which he appears, also, as the principal witness against the defendant. What was said by the chancellor in *Ward v. Van Bokkelen*, 2 Paige's C. R. 289, about the purchase of choses in action, for the purpose of a litigation, may not be very inapplicable here.

But, in regard to the merits of the claim itself. The answer, which appears to me to be fairly responsive to the calls of the bill, denies the existence of any trust or relation of debtor and creditor since June, one thousand eight hundred and twenty-two, when, it shows, a settlement took place between the defendant and Louis Plet, and when the latter surrendered the possession and all further claim to the property; and the particulars of this settlement out of the payments made by the defendant to Plet, are stated. So far, even Dias agrees with what is said in the defendant's answer; but Dias says, and here is the essential difference, that the defendant was to sell the property on Plet's account, and that there was still a trust. All the circumstances, however, speak a different language; the documentary evidence is against it, and, taken in connection with the defendant's pos-

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COMMERCIAL
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THE BANK OF
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itive answer, far outweigh, in my estimation, the testimony of so busy and feeling a witness as Dias.

It would be unjust at this late day, to compel the defendant to submit to an accounting; and even if he were required to do so, I do not perceive that the complainant could hope to gain any thing by it from the state of the accounts as exhibited, and the condition of the property, and its results as disclosed in the testimony.

I must dismiss the bill, with costs.

COMMERCIAL BANK OF BUFFALO v. THE BANK OF THE
STATE OF NEW YORK.

In relation to a loss of \$2,000, in notes of and belonging to the Bank of Buffalo, it appeared, from the testimony of clerks of the Bank of the State of New York, that the latter bank had received during a certain week \$56,526 of such notes; that they counted them, did them up into small parcels, marking each parcel and making a list, and then bundled and sealed them up; and the parcel (whatever it really contained) got safe to the bank of Buffalo—but the cashier and another clerk of the latter bank deposed positively to a deficiency in the parcel to the amount of \$2,000, from having actually counted the notes contained therein when opened, and also that, while so counting, none were purloined, mislaid or overlooked, they assorting the notes, putting those of the same denomination together, and then counting those of such denomination by themselves, setting down the number and amount on the list found in the bundle; and by adding the total together, finding the deficiency: *The Court held*, that the Bank of the State of New York should make good to the Bank of Buffalo the \$2,000 of missing notes; but decreed that each bank should bear its own costs of suit.

1839.

Bank.
Lost notes.
Costs.

QUESTION as to making good a loss of two thousand dollars of notes of the Bank of Buffalo which had been received by the Bank of the State of New York in the city of New York; and which the latter insisted they had, in a parcel formed of these and other notes of the Bank of Buffalo, forwarded to the latter. Further particulars will be found in the opinion of the court.

THE VICE-CHANCELLOR :—This case turns altogether upon a point of fact about which the parties are at issue : namely, whether the two thousand dollars in notes of the Commercial Bank of Buffalo (being the matter in controversy) were not contained in the packet or bundle of notes made up by the clerks of the defendants for transmission, when it was put under envelope and sealed and delivered to the messenger or agents of the complainants for that purpose ?

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NEW YORK.

There is no reason to suppose that the two thousand dollars were abstracted from the bundle after it left the Bank of the State of New York and before it reached the complainants ; for, the testimony shows the seals had not been broken, nor the interior of the packet disturbed. I am bound, therefore, to believe that when received at Buffalo it was in the same condition as when it left Wall street in New York ; and if, on its being first opened at the Commercial Bank of Buffalo, it was deficient two thousand dollars, that deficiency must have existed when it was enclosed and put under seal. The defendants' witnesses (their clerks) undertake to prove that no such deficiency existed ; that the amount of the circulating notes of the complainants received by the defendants during the week ending on the twentieth day of April, was forty-six thousand five hundred and twenty six dollars ; that the amount was ascertained by actually counting the notes done up into small parcels, and each parcel was marked and a list made, and the whole added together on the list, and then the parcels of notes and list bundled together and sealed up. This was done in the ordinary course of that branch of business at the Bank of the State of New York, not only for the complainants, but for some sixty or more of other country banks. The witnesses cannot speak positively, from any recollection they have, of this particular packet of notes, except from their firm belief arising from the care and general accuracy with which they conducted that department of business in what was called the redemption office of their bank. Now, I think it is fair to conclude that they are accurate as to the amount that was taken in for redemption that week—that the notes were counted in parcels and marked and set down correctly in

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the list, making altogether the forty-six thousand five hundred and twenty-six dollars; for, if an error of two thousand dollars in that amount had occurred, an examination of their cash account and of the cash on hand would have enabled them to discover it; but no such error could they find. In another respect, however, a mistake may have happened, which no examination at their office would disclose; and that is, a parcel or parcels containing just two thousand dollars may have got separated from the rest, and, instead of being put into the packet or bundle for the Commercial Bank of Buffalo, may have been placed accidentally, or from mere oversight, with other parcels of notes belonging to some other of the country banks which the clerks were, at the same time, engaged in putting up in a similar manner preparatory to being sent off: and thus the missing two thousand dollars may have found their way into the hands of a clerk, teller or officer of some other bank, who has dishonestly concealed the fact of his finding the money and applied it to his own use. This is the most rational mode of accounting for the loss of the missing notes, if, indeed, the bundle was deficient the amount suggested when it was first opened by Mr. Daniels, the complainants' cashier.

The fact of such deficiency the complainants are bound to make out. The burthen is thrown upon them by the nature of the issue and the weight of evidence on the other side.

Daniels and Caryl, two of the complainants' witnesses, do, indeed, swear positively to the deficiency; and this too from having actually counted the notes as contained in the bundle when it was opened. They are positive, also, that while the counting was going on, none of the bills could have been purloined or mislaid or overlooked.

Mr. Daniels opened the parcels and assorted the notes, putting those of the same denomination together, and then counting those of such denomination by themselves—setting down the number and amount on the list found in the bundle; and, by adding the whole, found the total to be two thousand dollars less. By the same mode of counting the notes, Mr. Caryl, the teller, arrived at the same result.

From the care that was taken to prevent any accidental

mislaying or confusion of the notes, while the investigations to ascertain the amount were going on, as testified to by these witnesses, I can hardly suppose that there was a loss or mislaying of notes to produce that large difference : but, there is one thing in which it seems to me that Mr. Daniels was remiss and which I am surprized that any cashier or officer of a bank, undertaking to ascertain the amount of a bundle or packet of bank notes put up as these were, should omit—and that is, to take off the amount in figures which he finds marked on the strap or band around each parcel of notes in the bundle, and add them together to see if the amount in the aggregate agrees with the amount shown by the list. I do not understand from Mr. Daniels' deposition that he made this comparison at all. He appears to have taken the different amounts marked on the parcels and set them down in his "scratch-book," but he does not say that he compared them with the list in the first instance. If he had made that comparison, it would have shown him, at once, whether any of the parcels contained in the list and making up the items thereof were missing ; and if such appeared to be the fact, it would have furnished an additional test of the accuracy of his further count, showing the deficiency. But, notwithstanding that comparison was not made in the first instance, I am constrained to say, from the testimony of the cashier and teller, that there was a deficiency of two thousand dollars of the notes when the packet was received at the complainants' bank ; and, from the other testimony in the cause, that it was short that amount when it left the bank of the defendants. Consequently the loss must be borne by them.

A point has been raised as to the propriety of making Mr. Withers a party defendant in his official capacity as cashier of the defendants ; and the court is asked to dismiss the bill, as to him, with costs. The practice of making an officer of a corporation, against whom a bill is filed, a party defendant for the purpose of having the answer that shall be put in verified by oath, has been too long and too well established to be questioned at this time : (9 Paige 193.) There was nothing improper in making Mr. Withers a party for that purpose in this instance ; and his right to costs must be de-

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terminated by the right of the corporation, whose officer he is, they being identical.

With regard to the costs of the suit, resting as they do entirely in the discretion of the court, to be awarded to or withheld from the prevailing party, according to circumstances and not always following the event, I think enough appears to excuse the defendants from paying the complainants' costs. The officers of the Bank of the State of New York had as good reason for believing in the accuracy of their clerks, as in that of the cashier and teller of the Commercial Bank of Buffalo. It was a fair question to be raised upon their respective evidence; and, after all, the scales have hung very nearly even. There has been but a slight preponderance, not enough to show that the defendants have litigated otherwise than in the most perfect good faith, and from what the officers of the bank must have felt was an honest and conscientious discharge of their duty towards those whose interests were confided to their direction and management, to resist the claim. Besides, there appears to have been little or no pains taken by the officers of the Commercial Bank of Buffalo, before filing their bill, to satisfy the defendants that the mistake had occurred with them—they had been notified of the alleged deficiency, and had received back from Buffalo the original list, (made the exhibit A in the cause,) with Mr. Daniels' figures upon it; but this served very little to shake their confidence in their own clerks' accuracy. The "straps" that were around the parcels had been destroyed, and the evidence they would have furnished, if carefully preserved and returned, might, perhaps, have had a more convincing effect than Mr. Daniels' bare assertions at that time. Though the complainants have succeeded, yet it is under circumstances requiring them to bear their own costs of the suit.

Decree—That the defendants deliver to the complainants or their receiver or agent, the two thousand dollars of notes of the Commercial Bank of Buffalo, still in the possession of the defendants—and that the parties bear their own costs, respectively, of this suit.

1840.

SIFFKIN
v.
MANNING.

SIFFKIN v. MANNING.

On a bill to get back goods on the ground that they were obtained by false pretences and on a fictitious sale, the defendant, under the statute to compel defendants to answer bills in certain cases, (Session's Laws of 1833, p. 17,) must answer as to the alleged false pretences.

BILL for discovery and relief, to get back goods obtained, as alleged, by fraud; but assumed to be a sale by the defendant. The latter interposed a demurrer, accompanied by an answer. The matter of the demurrer now came before the court.

Jan. 21,
1840.

Pleading.
Answer.
Demurrer.

Mr. *H. F. Clark*, in support of the demurrer.

Mr. *Charles Edwards*, contra.

THE VICE-CHANCELLOR :—I am inclined to think that this demurrer is overreached by the answer within the decision of the Chancellor in *Leaycraft v. Dempsey*, 4 Paige's C. R. 124; *i. e.* that it is inconsistent with what the answer in its outset assumes to cover. But, however this may be, I think the statute to compel defendants to answer bills in this court in certain cases where they might otherwise be exempt, Session's Laws of 1833, p. 17, applies to this case. Among other things, a defendant shall be compelled to answer "where the defendant shall be charged with any fraud whatever affecting the right or property of others." The obtaining goods by false pretences, which may subject the party to an indictment, is obtaining them by fraud; and though he must answer in relation to the fraud or the false pretences, yet the statute forbids any use being made of his answer as evidence against him on any complaint or on the trial of an indictment for the fraud. This is all the protection that justice requires he should have. The demurrer must be overruled, with costs; and the defendant must answer those parts of the bill to which the demurrer relates in twenty days.

1840.

WALKER
v.
TROTT.

WALKER v. TROTT and another.

Where, on a dissolution of a partnership, it is consented that two of the partners shall have charge of its properties and wind up the concern, their possession is not to be lightly interfered with. There must be palpable breach of contract or duty or act amounting to fraud or an endangerment of property or rights of the withdrawing partner. The latter cannot intercept their proceedings under mere apprehension of loss or because he may think they have not acted discreetly or judiciously.

April 16,
1840.
Partner-
ship.
Dissolu-
tion.
Injunction.
Receiver.

THERE had been a partnership between the plaintiff and defendants, and then a dissolution with an agreement that the defendants were to remain in charge of the properties and wind up the business. A motion was now made for an injunction and receiver, on the ground of alleged wrongful acts, as for instance, because the defendants had carried on their own business on the old premises; had not charged themselves with rent; had not manufactured a certain article, but sold it in the market at a loss; dilatoriness in settling the debts; had used money of the firm to pay rent for themselves; had made improvements and repairs for their own benefit; and that they had advertised the old establishment and would buy it in themselves.

Mr. John W. Edmonds, in support of the motion.

Mr. Kimball, contra.

THE VICE-CHANCELLOR:—The agreement entered into on the first of November, one thousand eight hundred and thirty-nine, on the dissolution of the partnership, that the defendants were to have charge of the partnership property and to go on and wind up the partnership concern, is not to be interfered with on slight grounds. There must be some palpable breach of contract or of duty or some misconduct amounting to fraud or such as will endanger the property and the rights of the partner who has withdrawn in order to justify this court's interference by injunction and receiver: Collyer, 196, 197. The various allegations in this bill

- against the defendants are fully met and explained, and I am at a loss to perceive any sufficient ground of misconduct or bad faith or breach of duty on the part of the defendants within the principle laid down for depriving the defendants of the power of going on as they are doing to bring the business of the late partnership to a close. Of course the defendants will be held to account for all the property and the manner of disposing of it ; and if any improper or erroneous sale or disposition is made, the complainant will have an opportunity of claiming remuneration from them for any loss or sacrifice of his interests. But it does not follow that the complainant has a right to intercept their proceeding under a mere apprehension of such loss or because he may think the defendants have not acted discreetly or judiciously in some particulars. The motion is denied ; but costs may abide the event of the suit.

1840.

WALKER
v.
TROTT.

1842.

DE ROSE
v.
FAY.

DE ROSE v. FAY and others.

Where a client complains that his solicitor, while acting as such, has fraudulently obtained from him a judgment and money thereunder, for unjust fees and charges, the *onus* is thrown upon the solicitor to prove consideration for each and every item.

A solicitor, acting for several clients in a matter, must not, *pendente lite*, get one of them to give him security upon that one's estate or rights, for the fees coming to him from another of the clients: unless where the effect and extent of the liability are most distinctly explained.

An accumulation of costs, arising from a solicitor's spreading litigation by a second suit, while the first is pending, and might, by an amendment or otherwise, be made sufficient, will be disallowed; and, if paid, must be refunded. The client's consenting to the proceedings, by signature and oath, to the pleading involved, does not debar him from questioning its propriety.

A solicitor, while acting as such, should not encourage or allow a client to sign a petition to be presented to the court beneficial to the former.

April 11th,
1842.

Solicitor
and client.
Profes-
sional con-
fidence.
Costs.

THIS case now came before the court on the master's report, and testimony taken before him on the complainant's petition against her solicitor. The decision of the Vice-Chancellor will be found to embrace the facts fully.

Mr. W. Silliman, for the petitioner, Ann Fay.

Mr. Jonathan Miller, for the solicitor.

Dec. 13.

THE VICE-CHANCELLOR :—The object of this proceeding on the part of Ann Fay, against her late solicitor, is to compel him to refund or pay over moneys to her which he has received under the decree and orders of the court made in this cause. The suit was for a sale, in partition, of certain real estate in which Mrs. Fay was interested, to the extent of eight eighteenth parts; Susan Ann De Rose, the widow of Anthony L. De Rose and her three infant children, were interested in five eighteenth parts, and Matilda De Rose, the widow of John P. De Rose and her infant child, were owners of the remaining five eighteenth parts.

The bill was filed on the tenth day of August, one thousand eight hundred and thirty-six; and, on the seventeenth day of April, one thousand eight hundred and thirty-nine, a final decree was made in the cause, under which the property was sold for fourteen thousand dollars. Pending the suit, and on the third day of July, one thousand eight hundred and thirty-eight, W. S. S. procured a judgment to be entered up of record against his client Mrs. Fay, and against Mrs. Matilda De Rose, by virtue of a warrant of attorney and their joint bond made to him for the payment of two hundred and twenty dollars and twenty-seven cents, with interest. On the twenty-fourth day of November, one thousand eight hundred and thirty-eight, he procured another judgment to be entered up, in like manner, against his client, Mrs. Fay, by virtue of another bond and warrant of attorney for the sum of two hundred and fifty-seven dollars with interest.

On the reference in the partition suit to ascertain liens, these judgments were presented by Mr. S., and the same were reported by the master: the first, as a lien on Mrs. Fay's and Matilda De Rose's share of the estate, and the other on Mrs. Fay's share alone; the amounts, for principal and interest, computed to the date of his report, were decreed to be paid with additional interest to the time of payment; and they were paid exclusively and entirely out of the eight-eighths of the proceeds of sale to which Mrs. Fay was entitled or in which she was interested. She now states in her petition that she was not indebted to the said W. S. S. in any such amounts; and never, knowingly or intentionally, executed such bonds and warrants of attorney; and that the same must have been procured from her by fraud and misrepresentation. But she admits that she once borrowed fifty dollars of him, and also that, at the same time, her sister-in-law, Matilda De Rose, borrowed a like sum; and that they gave their joint notes for the two accounts; and, likewise, that she afterwards borrowed money of him, at different times, to the amount of about fifteen dollars. Also that she recollects he once asked her to sign a paper which he informed her was to secure the one hundred dollars and some part of the fifteen dollars; and that these were the only

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papers he ever requested her to sign in regard to money lent or money due to him on any account whatever. On these allegations, I deemed it proper to refer the subject to a master, to take proof of the consideration of the two judgments; and, under the circumstances of relationship in which the parties stood to each other, viz., that of solicitor and client, I considered that sound policy required Mr. S. to prove the consideration of the indebtedness, notwithstanding the existence of the bonds and judgments.^(a) The order accordingly cast the burthen of proof upon him, requiring him to adduce evidence before the master of the consideration and of the particular items of account or indebtedness on which the judgments were and each of them was founded.

The subject has undergone an investigation before the master, who has taken and reported the evidence; and the whole case has been argued before me and awaits a decision. The testimony of Mr. Millspaugh shows the consideration of the two bonds and judgments. The consideration of the first was made up of the following items:

1836, June 16. To services getting the corporation	
to take the mortgages,	\$ 50.00
To money lent to Mrs. Fay and	
Mrs. De Rose,	100.00
To interest thereon,	7.77
To expenses going to Albany on	
business, per Mr. Magill,	37.50
To charges on Day Book,	25.00
	<hr/>
	\$220.27

It is proved, in support of the item of fifty dollars, that Mr. S. was instrumental in procuring the corporation of the city of New York to take an assignment of two mortgages upon the property from the receivers of the Globe Insurance Company, an insolvent institution, so as to prevent an immediate foreclosure; and that, on objections being raised by the counsel of the corporation to their taking the mortgages and advancing the money, Mr. S. succeeded, by furnishing explanations to the counsel, in removing his objections;

(a) See *Lewis v. Morgan*, 3 Y. & J. 230.

and it is further proved that fifty dollars was a reasonable compensation for the trouble and pains he took on that occasion, and that even more might be charged, if getting the matter through was an important service to his clients. But who the clients were in that business, or who retained the solicitor, or at whose instance he undertook the matter, no where appears. John P. De Rose, the husband of Matilda, was then living. Mr. S. held a mortgage for two thousand dollars on his undivided share of the estate. The widow and children of Anthony L. De Rose were also interested, as tenants in common; and if it was for the benefit of one, it was for the benefit of all the owners that this service was performed. As the result has shown, however, it was a dis-service: for, if the mortgages had been foreclosed and the property sold in the year one thousand eight hundred and thirty-six, as it would have been if the corporation had not been prevailed upon to take the assignments, it would have made a difference to the owners of from eight to ten thousand dollars in the price, and there would have been a saving of about one thousand dollars besides in the costs and expenses of the proceedings to obtain a sale. It is difficult to imagine a sufficient reason for not leaving the receivers of the Insurance Company to proceed and foreclose the mortgages, instead of procuring a transfer of them to the city corporation; unless, from an anxiety, somewhere, to make more out of it in the way of costs of a partition suit than could be made by a foreclosure and an adjustment of the rights of parties to the surplus when the same should be brought into court. The owners were all desirous, at that time, of having a sale, for the sake of a partition and settlement among themselves; and the bill in this cause was filed as soon thereafter as it could be prepared. Still, the fifty dollars worth of service, as it was deemed to be at the time, has been performed; but, I think Mr. S. had no right to charge the whole of that sum to only two of the owners, much less to take pay of the whole out of Mrs. Fay's share of the property, as the sequel has shown was done.

The proportion of the fifty dollars to be borne by Mrs. Fay, according to her eight-eightieths of the estate, was twenty-two dollars and twenty-two cents, which is all

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that Mr. S. could, fairly, exact from her. True, she and Matilda De Rose assumed to pay the whole of it, by giving their joint bond and a confession of judgment, but, at that time, they were his clients or, at least, Mrs. Fay was; she had confided to him the care and protection of her rights in the very property he was thereby seeking to obtain a lien upon for his own benefit. Standing in that confidential relationship, he had no right to ask her to assume the payment of any more money to him than she had originally contracted to pay or was in strict justice and equity liable for. Although she may have readily consented to assume the liability and, to all appearances, have freely executed the securities, knowing that the object was to charge or encumber her estate for the benefit of her solicitor, yet, the law, from motives of the wisest policy, will not allow him to hold an advantage thus acquired. As her solicitor, he was bound to advise her against any acts she might be disposed to do which were detrimental to her own interests: *Sir Watkin Lewis v. Morgan*, 3 Anst. 774; *Lewes v. Morgan*, 5 Price 42; *Gibson v. Jayes*, 6 Ves. 266, 278, 280; and hence, he could not, with reason or propriety, accept from her securities which were to have that effect. Upon principles of public policy, all dealings between solicitor and client are to be anxiously scrutinized in equity, in order to protect the client from the consequences of his own acts done under the influence or ascendancy which the former is supposed to acquire over the latter: *Bellew v. Russel*, 1 Ball & Beatty, 107. A purchase of the thing in litigation, of which litigation the attorney has the management, will be set aside; and securities obtained *pendente lite*, agreements for *extra* reward, and gifts made by the client to the attorney, during the time when the attorney has in hand the transacting of the client's affairs, will be annulled, even without proof of actual fraud: *Welles v. Middleton*, 1 Cox, 112; *Montesquieu v. Sandys*, 18 Ves. 312. Settled accounts will be looked into and opened; and the court will take care to see, in every case of dealing between solicitor and client, that no sort of disadvantage has resulted to the client, at the same time that full justice is done to the solicitor. The books are full of cases of every possible variety where this principle is recog-

nized, (see Merrifield's Law of Attornies, ch. VII. for a reference to them.)

Keeping this great principle in view, I shall proceed to the other items which form the consideration of the first mentioned judgment. One hundred dollars of it is for money lent, and some interest thereon. This money was lent in two distinct sums, fifty dollars to Mrs. Fay, and fifty dollars to Mrs. De Rose. Mr. S. has adduced no evidence to show, (independent of the fact of their making a joint note) that these loans were made upon any original understanding that the borrowers were to become sureties for each other's respective loan. Their joining in the note, in the first instance and afterwards in the bond, may have been a matter of convenience to avoid multiplying the evidences of debt; and it is not such an assumption or obligation as, under the circumstances, gives to the solicitor a right to take payment of the whole out of the individual property of Mrs. Fay, which was then in a suit under his charge. It matters not that she seemed willing to sign the papers when prepared and presented to her without actual fraud or misrepresentation on his part. He was bound to apprise her distinctly of the legal effect of the papers, and of the extent of the liability she was subjecting herself and property to by signing them; and he should be prepared to prove that he did so; or else, he should not have asked her to make herself liable to him for any thing more than his actual advances for her benefit. Standing in the relation of solicitor, I think he had no right to impose upon her, for his own benefit, a voluntary suretyship for another, even with her own consent. Fifty dollars of the money, therefore, which was lent to Mrs. De Rose, with the interest thereon which he has received, must be refunded to Mrs. Fay. The item of thirty-seven dollars and fifty cents, expenses incurred for William Magill, stands upon the same footing. Mrs. Fay had nothing to do with this. Magill was the son of Mrs. De Rose; and she alone was responsible for the payment of that money. And so far as Mrs. Fay's money has been applied to that object, it must be refunded by Mr. S., with interest.

As respects the charges on day-book, amounting to twenty-five dollars, no evidence has been given what they were for.

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The solicitor was bound to prove those charges *aliunde*. He has not done so; but, since Mrs. Fay has stated, in her petition, that she borrowed some small sums at different times to the amount of about fifteen dollars, it may be a fair inference that they constitute a part of the day-book charges, and to the extent of fifteen dollars, of the twenty-five dollars, Mr. S. may be allowed to keep what he has received; but the remaining ten dollars he must refund.

I now come to the second judgment, obtained by Mr. S. against Mrs. Fay solely on the twenty-fourth day of November, one thousand eight hundred and thirty-eight, and on which was reported to be due by the master, as a lien on her share of the estate, the sum of two hundred and seventy-one dollars and twenty-five cents. This was entered up by confession on a bond and warrant of attorney. It appears that, after the bill was filed by Susan Ann De Rose in the present suit and while the same was pending, Mr. S. filed a bill before the chancellor, in behalf of Mrs. Fay, as a complainant, for the same object. To that bill, a plea of the former suit pending for the same cause was interposed; and which plea was allowed by the chancellor, and the bill was dismissed with costs. For the defendant's costs therein, an execution issued; and Mrs. Fay's right and interest in the property in question was sold by the sheriff and purchased by Mr. Lansing, but was afterwards, by consent of the purchaser, redeemed out of the proceeds of the sale under the decree in this cause. For Mr. S.'s costs and counsel fees in such suit a bond and warrant were given to him by his client; and on which the last mentioned judgment was entered up. The items constituting the two hundred and fifty-seven dollars, for which the bond and warrant of attorney were given, have not been laid before me. They were contained in a statement produced before the master, and marked exhibit No. 4, but which exhibit has either been mislaid or was withdrawn from the master's office; and has not been produced on the hearing. It is understood, however, to have contained a charge of one hundred dollars for a counsel fee, in addition to taxable costs of the suit, (but it does not appear that the costs have ever been taxed) and a charge of fifteen dollars for services out of the suit in looking after some rents

of the property. The good faith of Mr. S., in filing the bill for Mrs. Fay, and thereby subjecting her to so heavy an expense, is brought in question. He attempts to justify the measure, on the ground that the bill filed by Susan Ann De Rose was defective or imperfect in some respects or became so by the death of one of the parties, and that the solicitor delayed proceedings; and that, according to the latter branch of the decision in *Matthews v. Matthews*, 1 Edwards's V. C. R. 565, the bill was too hastily and prematurely filed, and a decree for a sale could not be made upon it. It is also said, that, in allowing the plea to the second bill, the chancellor was obliged to overrule the decision of *Matthews v. Matthews* on that point. The answer to all this is, that any defect in or imperfection about the first bill could form no ground for filing a second bill for the same object, while the first was still pending: because the defects could be cured by amendment, and the imperfection arising from the death of a party could be, and was, in fact, removed by a revivor; and there was, at no time, such a delay in the prosecution as amounted to an abandonment of the suit. And, as to the filing of the bill by Susan Ann De Rose, so soon after the death of Anthony L. De Rose her husband (from whom she derived title as devisee under his will) as not to allow time for a proceeding to be had before the surrogate for a sale for payment of his debts, it being suggested in the answer of Mrs. Fay that there were debts of Anthony L. De Rose, which his personal estate was insufficient to pay, in which respects the case was similar to that of *Matthews v. Matthews*, but, in the case referred to, it was not decided that a tenant in common had no right to file a bill immediately after the death of the ancestor or within the three years, and for that reason that his bill should be dismissed as prematurely filed. The decision there made goes no further than this: that, upon such facts, the court would not proceed to decree an immediate sale and distribution of the proceeds, but would retain the suit in court, with leave to the complainant to move in it at a future day, when it could be seen that a sale could be made with due regard to the rights of creditors. This conclusion and the denial of the party's right to file a bill, and its consequent dismissal, are very

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different things, and the case of *Matthews v. Matthews* could have furnished no sufficient ground for the supposition that Susan Ann De Rose's bill would be dismissed, merely because it was filed within a few months after the death of her husband and while his simple contract debts were left unprovided for.

Again: even if *Matthews v. Matthews* could be considered as going against her entire right to file a bill under such circumstances, it would form no justification or excuse for filing another bill for the same object, so long as the first remained undisposed of. The plea of the other suit pending would be equally fatal to the second, although the first might be untenable and would be dismissed at the hearing. In support of such a plea, the court has only to ascertain the fact of the pendency of the suit pleaded, and not whether it is properly brought or will probably be defeated or dismissed.

For this reason alone the chancellor might well allow the plea to be a good bar, without disturbing the decision in *Matthews v. Matthews*. If the solicitor really supposed the bill of Susan Ann De Rose would be dismissed, as being prematurely or irregularly or improperly filed, he should have waited until he could bring about such a result; but, to file another bill in behalf of his client for the same object, with a full knowledge of the pendency of the first and without any reason to suppose that its prosecution was intended to be dropped or abandoned, betrays either gross ignorance of principles of law and the practice of the courts, or an inordinate desire to involve the estate or the client in unnecessary litigation and expense, by which the solicitor might profit. In every such case, it is the duty of the court to interpose and protect the client from the consequences of such misconduct. In *Wood v. Wood*, 4 Russ. 558, a petition imputed various acts of misconduct to a solicitor who had had the conduct of the suit; one charge against him was, that he abandoned a suit which was depending, and unnecessarily instituted a second suit, though every useful purpose might have been accomplished by means of the first suit, or, at least, much expense might have been saved by adopting the proceedings in it. The Lord Chancellor said:

"If a suit is depending and is prosecuted up to a certain point, and the solicitor improperly abandons that suit, and unnecessarily institutes a new suit, the court will take care that the client shall not suffer by the adoption of such a course of proceeding." In *Piggott v. Williams*, 6 Mad. R. 95, a solicitor filed a bill for foreclosure of an estate pledged to him as a security for costs. The client filed a cross bill, alleging that the costs, for which the security had been given, would have been avoided if the solicitor had conducted himself with integrity, skill and attention, and praying a surrender of the security. To this bill, the solicitor demurred: on the ground, that the claim of the client for negligence or want of skill could only be tried in an action at law. The court overruled the demurrer, declaring that the client had a clear title to restrain the solicitor from proceeding to enforce the security while the demand for damages remained unsatisfied, and that such damages, when ascertained, could be made a matter of equitable set-off. These cases are sufficient to show the nature and extent of the authority which this court of chancery will exercise in cases of this sort. Although Mrs. Fay may have assented to the filing of the second bill, and subscribed and sworn to it, she is not thereby precluded from calling in question the motives and conduct of her solicitor. It appears, from some parts of the testimony, that he encouraged and strongly advised her to allow him to file such bill as being necessary to the establishment of her rights. And, in authorizing it, she was doubtless governed entirely by his advice. Nor do I consider that she is prevented from questioning the fairness of the consideration and validity of the judgment by the seeming freedom with which she executed the bond and warrant of attorney when requested to do so. The request came from the solicitor while she happened to be in his office. A short statement or account of the amount of costs and fees was shown to her; and she expressed a willingness to execute such papers as might be prepared. His clerk made out a bond and warrant of attorney, which she signed immediately on the spot and before leaving the solicitor's office, and without taking time to reflect or advise with any other person on the subject. Such a ready acquiescence in the solicitor's

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demand shows a pervading influence which calls for the interference of the court to protect her from the consequences of her act, where it appears that the demand was far from being a meritorious and a just one: for, I am constrained to say, that I think the costs and counsel fees of that attempt to carry on a second partition suit, pending the one which had already been commenced and was then in progress, could not have been recovered against her by any compulsory or hostile proceeding; and, consequently, that she is entitled to have the money refunded, with interest. Fifteen dollars for other services, which was included in the bond and judgment, may have been a meritorious demand; and this the solicitor may be allowed to retain.

I come now to another and more important branch of this case. The decree made in the cause had provided that, after paying the costs of the suit and discharging the incumbrances upon the whole estate, and satisfying some general and specific liens upon the undivided eight eighteenths in which Mrs. Fay was interested, the residue of that share of the proceeds of sale should be brought into court to abide its further order. It having been determined, by the decree, that Mrs. Fay's eight eighteenths of the estate, although purporting to be a fee, was liable to be defeated by the limitation over in the will, under which the title was held in the event of her dying without issue living at the time of her death, and which was good by way of executory devise to pass the eight eighteenths to her brothers, Anthony L. and John P. De Rose, and their heirs; and as Mrs. Fay was a widow without children, and the event was likely to happen by which the fee was to vest in others, her interest was put on the footing of a life estate, with remainder to the infant children of the two deceased brothers. After making the payments and division of the proceeds, as directed by the decree, the balance of that share to be brought in, as stated by the master, was two thousand four hundred and nineteen dollars and forty-eight cents. But, it was found that there was a deficiency of nineteen hundred and eight dollars and thirty-three cents on the mortgage-debt of four thousand two hundred and seventy-five dollars and two cents, by virtue of the second mortgage held by the corporation of the

city of New York, after applying the whole nett share (five eighteenthths) which had belonged to Anthony L. De Rose, and three hundred and eighty eight dollars and sixty-seven cents out of the other five eighteenthths which had belonged to John P. De Rose. And to make good that deficiency, Mrs. Fay's share and the balance of the share belonging to the widow and children of John P. De Rose were liable, they, (Mrs. Fay, and John P. De Rose and wife) having joined in that mortgage with Anthony L. De Rose and wife, Mrs. Fay, however, merely as a surety, she having received no part of the mortgage money, and John P. De Rose as a principal in it to the amount of the three hundred and eighty-eight dollars and sixty-seven cents, and beyond that also he stood as a surety for Anthony L. De Rose. The nett amount of the share of John P. De Rose in the estate, after paying out the three hundred and eighty-eight dollars and sixty-seven cents to the corporation, was one thousand five hundred and eighty-nine dollars and thirty-four cents. This balance was covered and would be entirely absorbed by another mortgage on that share of the estate which had been executed by John P. De Rose and wife in his life time to Mr. S.; and which the latter had, nominally, assigned to Mr. Millspaugh, but of which Mr. S. was still the owner in fact, and on which mortgage there was due upwards of two thousand three hundred dollars. If the remaining one thousand five hundred and eighty-nine dollars of the John P. De Rose's share or any part of it should be taken to make up the deficiency to the corporation of the Anthony L. De Rose mortgage debt, then, Mr. S. would be a very considerable loser of his mortgage debt; but, if the money which was to be paid into court, in which Mrs. Fay was interested, could be taken and applied to the payment of the corporation, then, the fund applicable to Mr. S's. mortgage, would be relieved from the prior incumbrance and he would be benefited, at least, to the extent of that relief. A petition was, therefore, prepared and presented by Mr. S., as solicitor for Mrs. Fay, (signed and verified by her in the usual manner after she had heard it read) stating her willingness and consent that the balance or deficiency due to the corporation of the Anthony L. De Rose mortgage debt should be de-

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ducted and paid out of her share and interest in the proceeds in the hands of the master; and that she was willing to take a sum in gross for her interest in the balance which would remain of the fund, after payment of such deficiency to the corporation; and praying an order accordingly. An order was made accordingly upon this petition on the twenty-third day of June, one thousand eight hundred and forty; and under and by virtue of which the master went on and paid the deficiency to the corporation out of the eight eighteenth share of the proceeds, and computed the gross value of Mrs. Fay's interest, as a life estate in the balance, at three hundred and twenty-eight dollars and thirteen cents, which he paid over to her and she accepted and, thereupon, executed a release as to the residue of the fund. This residue, being only one hundred and eighty-two dollars and two cents, the master paid into court for the benefit of the infant children of Anthony L. De Rose and John P. De Rose, as the persons entitled in remainder to that share of the estate.

The effect of that petition and order was directly to benefit Mr. S. He was, thereby, enabled to receive all that remained of the John P. De Rose share on account of his mortgage. He and Mrs. Fay stood in the character of co-sureties for Anthony L. De Rose; and those two shares of the estate were liable to contribute equally to make good the deficiency due to the corporation. One half was nine hundred and fifty-four dollars and sixteen cents, but, by taking the whole amount (one thousand nine hundred and eight dollars and thirty-three cents) out of Mrs. Fay's share, it left so much more for Mr. S. to receive. Upon no principle of equality or equity was Mr. S. entitled to this—so far as that balance due to the corporation was concerned, it was a case of joint suretyship between Mrs. Fay and John P. De Rose in which the rule of equal contribution would apply.

The lien of the corporation had priority and preference to the S.'s mortgage; and the most that he could ask was that Mrs. Fay's share should bear one-half of it. And yet, Mr. S. was instrumental in getting up the petition for Mrs. Fay and procuring the order for the payment of the whole out of the fund in which she was interested. He was, still,

acting as her solicitor and as such, he subscribed the petition and presented it and obtained the order.

Whatever may have been her seeming willingness, again to petition the court for the purpose and to accept the small amount that was paid to her, it is impossible, as between her and her solicitor, to regard her as any thing more than a passive instrument in his hands, which he had no right, thus, to use for his own benefit. As I have, before, had occasion to remark, he had no right, in my opinion, to propose or allow her to do an act so detrimental to her own interest, but was bound to advise and protect her against such an act of folly and weakness. The Lord Chancellor of Ireland observed, in the case of *Segrave v. Kirwan*, 1 Beatty's R. 157, that wherever a professional man is called on to give his services to a client, whether to prepare a deed or will, the law imputes to him a knowledge of all the legal consequences to result, and requires that he should distinctly and clearly point out to his client all those consequences from whence a benefit may arise to himself from the instrument so prepared, and if he fail to do so, a court of equity will deprive him of it.

If this be true of a deed or will, why may it not be true of a petition to be presented to the court by which a client is made to relinquish an important interest for the benefit of the solicitor, and where it is very much a matter of course for the court to make an order pursuant to its prayer? There is, to be sure, some testimony which shows that Mr. S. informed Mrs. Fay that her interest and his were now likely to come in collision and that he suggested to her that she had better employ another solicitor. But I think he should have gone further and absolutely refused to draw up and present such a petition for her as he did, or, if he acted any further for her in the matter, it should have been only to petition that one-half and not the whole of the deficiency should be taken out of her fund. And, in this point of view, it matters not that she had friends at hand or other lawyers with whom to consult and advise. So long as Mr. S. chose to act as her solicitor, he was bound to give her just such advice as he would, acting as a sensible and good lawyer,

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have given her had he and his own interest been entirely out of the question.

Another objection exists, that the rights of the infants in and to this money, though somewhat contingent, have been entirely overlooked or disregarded in the order that was made authorizing the whole amount that was required to be taken out of that share of the estate. Counsel have now appeared in behalf of these infants and insist that it is not too late to rectify the error, by requiring the solicitor to refund, in order that the money may be placed in court for their ultimate benefit, subject, of course, to any claim which Mr. S. may have upon that portion which may vest in John P. De Rose's heirs after Mrs. Fay's death by virtue of his mortgage from John P. De Rose: if it shall appear that the mortgage covers that contingent undivided interest.

I see no escape from this conclusion. Mr. S. must be required to pay into court, within twenty days, out of the money which he has received of the John P. De Rose share of the estate, on account of his mortgage, the sum of nine hundred and fifty-four dollars and sixteen cents, with interest thereon from the twenty-third day of June, one thousand eight hundred and forty, being the time when he received or might have received it. He must, also, refund and pay into court all the money which he received for principal and interest, which was two hundred and seventy-one dollars and sixty-nine cents on his first judgment, excepting the twenty-two dollars and twenty-two cents, fifty dollars and fifteen dollars, amounting to eighty-seven dollars and twenty-two cents, as forming a part of the judgment with the interest thereon, which part and interest he has a right to keep; and he must pay interest on the residue of the two hundred and seventy-one dollars and sixty-nine cents from the time he received it in May, one thousand eight hundred and forty. He must, likewise, refund and pay into court all the money he received on his second judgment, being two hundred and ninety-four dollars and forty-five cents for principal and interest, except fifteen dollars included in and forming a part of that judgment, which he is entitled to hold with interest thereon; and he will have to pay interest on the residue received by him from the time he received it in May, one thousand eight

hundred and forty. And I must adjudge Mr. S. to pay the costs of this application and of the proceedings thereunder to be taxed.

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A master cannot charge for :

Attendance on receiving decree of sale, \$1.

Attending printers, \$1.

For more than one copy of terms of sale or notice of sale to annex, or for more than one copy of memorandum of sale for purchaser to sign where there is but one piece of property sold.

Drawing receipt of payment of ten per cent., copy or duplicate, 40c.

Drawing receipt to purchaser for the purchase-money and copy, 52c.

Attendance to settle with complainant, \$1.

Attendance to receive purchase money and deliver deed, \$1.

Computing amount due complainant under the decree, \$1.

Attendance on this computation, \$1.

Attendance to pay according to decree, \$1.

A duplicate beyond draft and copy of receipt for sum paid under decree.

Attending on receiving order made on a special motion, \$1.

A charge for payment of taxes or assessments where the purchaser is allowed to make and does make the payment and not the master.

Drawing receipt for taxes and duplicate, 40c.

Do. do. assessment and do. 40c.

Computing amount of surplus under decree, \$1. Attending on this computation, \$1.

Underwriting (to summons) and copy, 30c.

Drawing certificate of clerk of payment of surplus into court, copy and duplicate, 40c.

Attendance to pay printer for publishing notice of sale, \$1.

A master can charge for :

Drawing terms of sale, 5 fo., \$1, and one copy 30c; and one copy of notice of sale to annex, 4 fo., 24c.

Attendance to settle terms of sale, \$1.

Draft and one copy of memorandum of sale for purchaser to sign, 26c.

Attendance at sale, \$1.

Commissions on \$1800, proceeds of sale, \$14.

Drawing and signing deed to purchaser, \$5.

*Commissioner's fees taking the acknowledgment, 38c. Clerk's certificate there-
to, 25c.*

Drawing receipts for the several sums paid by the master under the decree.

Paying taxes on property sold, \$2.

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Paying assessments on same, \$2.

Drawing report of sale and schedules, where made in good faith and in anticipation of being needed.

Signing summons to settle report.

Copies of report of sale made for parties at request at 6c. per fo.

Engrossing report of sale, &c. to file, \$2.50.

Attendance to pay, \$1.

Drawing affidavit of publication of notice of sale, 2 fo., and copy notice to annex, and oath, 76c. (when really performed.)

Paid printer publishing notice of sale, \$4.

Posting notices in town and country, \$2 (when actually paid as a disbursement.) Affidavit of the fact, 67c. (do.)

*Master.
Master's
Fees.*

THE VICE-CHANCELLOR:—Motion to compel one of the masters of the court to bring into court some of the money which he has retained for fees out of the proceeds of mortgaged premises sold under the decree in the cause. He sold the premises for one thousand eight hundred dollars; and made up and filed his report, showing what disposition he had made of the money. Among other things, that he had retained sixty-six dollars and sixty-seven cents for his fees, commissions and disbursements; and had brought into court three hundred and twenty-one dollars twenty-four cents surplus. An account, by way of schedule, shows the particular items or charges making up the sixty-six dollars sixty-seven cents. The guardian *ad litem* of certain infant defendants objects to some thirty items or more of the master's charges in such account; and it is submitted to the court, not to the Vice-Chancellor as a taxing officer, how far these items are allowable. In disposing of the objections, I would observe, in the first place, that there are often steps taken and services performed which would seem to be unavoidable in the progress of a suit, for which no compensation by law has been made; and the rule, in taxing costs, is to disallow all charges for such services on the ground that the fee-bill, having enumerated certain services that are to be paid for and specified the rate or amount of compensation for each service, none other can be recognized as legal or proper to be taxed. The language of the heading of the fee-bill is such as necessarily to exclude all other services beside those enumerated. It is "for the following services hereafter done or performed in the several courts of law and equity in this state

by the officers thereof or in any proceeding authorized by law, the following fees shall be allowed." And whenever the chancellor has had occasion to review a taxation, it is evident, from his reported decisions, that he has felt himself bound by this principle to reject all charges for services not specifically or by necessary intendment embraced by or included in the fee-bill. The application of this principle to the master's charges, in the present case, overthrows a number of his charges :

1st. The first item objected to is :—" *Attendance on receiving decree of sale, \$1.*" It has recently been decided that such an attendance is not within the fee-bill.

2d. "*Attending printers, \$1.*" There is no allowance in the fee-bill for such an attendance, either with the notice of sale or order to procure its publication or to see that it is correctly inserted in the newspaper.

3d. *Drawing terms of sale 5 fo., \$1. 2 copies 60c, and copy notice of sale, 4 fo. each to annex, 48c.* \$2.08

I think here is an overcharge as respects copies. Where there is but one piece of property to be sold there can be no occasion for more than one copy and one copy notice to annex.

4th. "*Attendance to settle terms of sale, \$1*" appears to me to be a proper charge within the fee-bill. The master may summon the parties in interest before him and give them a hearing on the subject ; and it is many times very proper and necessary that he should do so.

5th. *Drawing memorandum of sale for purchaser to sign, 1 fo. Copy and duplicate, 40c.*" This is overcharged—why a duplicate copy when there is but one lot or parcel to sell ? There should be but the draft and one copy—26c.

6th. "*Attendance at sale, \$1.*" This is a questionable item. The words of the fee-bill are, " *Attending at the time and place of sale of property by him and adjourning the sale, &c. &c., \$1*"—but I think they may be read distributively or disjunctively, and that the fair and reasonable intendment is that it meant to give the fee for the attendance when actually sold, as well as for the attendance when the sale should happen to be adjourned. There is as much reason for it in one case as in the other ; and I believe that mas-

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ters have always charged in both instances, indiscriminately. I shall therefore allow this charge to stand.

7th. "*Drawing receipt of payment of ten per cent., 1 fo. and copy and duplicate,*" \$0,40

No part of this charge is allowable in my judgment. It is a paper given to the purchaser and not to the master. It is not such a receipt as he is directed, by the decree, to take and file with his final report. If it is necessary for the purchaser to have a receipt, let him pay the master for drawing it.

8th. "*Commissions on \$1,800 proceeds of sale, \$14,*" is a correct charge.

9th. "*Drawing and signing deed to purchaser, \$5, and commissioner's fees taking the acknowledgment, 38c, and clerk's certificate thereto, 25c.*"

These are all right.

10th. "*Drawing receipt to purchaser for the purchase-money, 2 fo. and copy,*" \$0,52

This is like the receipt for the ten per cent., and not allowable.

11th. "*Attendance to settle with complainant,*" \$1,00

12th. "*Attendance to receive purchase-money and deliver deed,*" \$1,00

Neither of these are allowable. They are not such attendances as are provided for by the fee-bill; and must be regarded as covered or compensated for by commissions. For what are commissions allowed? For no other purpose, I apprehend, than to remunerate the master for his trouble in receiving, safely keeping and distributing the money; and how can he do all this, except by attendances at his office or other place when the purchaser goes to pay and take his deed and the parties also go to receive under the decree?

13th. "*Computing amount due complainant under the decree,*" \$1,00

14th. "*Attendance on this computation,*" \$1,00

15th. "*Attendance to pay according to decree,*" \$1,00

These three charges seem to me to be covered by the allowance of commissions, like the items 11 and 12 just mentioned. "Computing the amount under the decree" is not such a computation or taking of an account as

the fee-bill provides for. The decree does not direct, in terms, the taking of an account of the amount due or the making of a computation. This has already been done and is shown by the master's report on which the decree is based. And the decree, then, merely directs the payment over of the amount reported due, with interest thereon from the date of the report. This, it is true, requires a calculation of interest; but it is a mere incident to the payment and distribution of the money directed by the decree which the commissions compensate. The attendances are parts of the same service.

16th. *Drawing receipts for the several sums paid by the master under the decree.* Such receipts he is directed to take; and it is proper for him to take them and file the same with his final report. They are proper subjects of charge for the master where he performs the service. But the master has overcharged this service. There can be no occasion for a duplicate beyond the draft and copy. Ten cents on each must be deducted.

17th. *Attending on receiving order made on a special motion, \$1,00.* This is not an allowable item, as before shown.

18th. <i>Paying taxes on property sold,</i>	\$2,00
<i>Drawing receipt for taxes fo. 1 copy and duplicate,</i>	\$0,40
<i>Paying assessments on same,</i>	\$2,00
<i>Drawing receipt for assessments fo. 1 copy and duplicate,</i>	\$0,40

The services of a master in paying taxes and assessments upon property sold by him, and which it is necessary to pay in order to make a clear title to the purchaser—is within the provision of the fee-bill, which allows a master two dollars for “superintending and certifying the payment of money when paid under his direction by a decree or order other than to a party in the suit or into court.” But the fact of the master's having performed the service of paying a tax or assessment in this case is denied. It appears, however, that there was a small tax of \$3,45 on the property when sold, which the master being informed of, allowed the purchaser to deduct from the purchase-money; and then, of course, accounting for it in his report as so much paid for taxes by him. Under

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these circumstances, I think the master cannot be considered as performing the service entitling him to charge the two dollars. He has been relieved from the trouble of seeing to the payment of the tax by his own consent in allowing the purchaser to retain the amount ; and has, thereby, waived his right to charge for the service. A similar charge of two dollars, for paying assessment, the master consents should be stricken out, because, in fact, there was no assessment paid by him and none on the property to pay.

The two receipts charged for at forty cents each, one for the taxes and one for assessments, must also be disallowed.

19th. *Computing amount of surplus under decree, \$1,00*
Attending on this computation, 1,00

There is no computation of surplus. The surplus, if any, must appear when the master makes up his final report ; and when he files his report, he deposits the surplus. There may be a computation or the taking of an account of deficiency when the decree so directs, for which the master may charge a dollar ; and if he has issued a summons for parties to appear before him on the occasion, as he may do, he will be entitled to charge for his attendance on it. But the two charges in question for computing surplus and attendance seem to me to be improper.

20th. *Drawing report of sale fo. 18 and copy, \$4,68*
Drawing schedule A. fo. 4 and copy 0,64
Drawing schedule B. fo. 3 and copy, 0,48

The copies of draft report and schedules before engrossment are objected to. Such copies may become necessary under the 109th rule ; and if they are, in fact, prepared by the master, in anticipation of being needed or called for and this is done in good faith, he may charge for them : but the master has charged in another place for two copies of report furnished at request and, of course, the copies here charged must come out.

21st. *Signing two summons to settle report, \$0,25*
Underwriting and copy, 0,30

I understand the master as swearing that summons were issued to attend the settlement of his report. It is not his business, however, to draw and copy the "underwriting" any more than it is to draw the summons. The chancel.

lor has decided, that both belong to the solicitor; and that the master cannot charge for any thing more than his twelve cents for signing summons.

22d. *Attendance to settle report of sale litigated,* \$3,00

It is denied that there was any argument or litigation about the settling of his report; and I do not understand the master as saying there was any. Two dollars of this charge must, therefore, be deducted.

23d. *Two copies of report of sale for parties at request,* 36 fo., \$2,16

These copies appear to have been furnished by the master, and are correctly charged.

24th. *Engrossing report of sale, &c. to file,* \$2,50

25th. *Drawing certificate of clerk of payment of surplus into court, fo. 1, copy and duplicate,* \$0,40

Attendance to pay, 1,00

The charge for duplicate copy of certificate and for certificate are both wrong.

26th. *Drawing affidavit of publication of notice of sale, fo. 2, and copy notice to annex and oath,* \$0,76

When this service is performed by the master, it is right for him to charge for it.

27th. *Paid printer publishing notice of sale,* \$4,00

Attendance, 1,00

As a disbursement by the master, the first of these two items is proper; but the attendance to pay the printer's bill is not provided for by the fee-bill.

28th. *Posting notices in town and country,* \$2,00

And affidavit of the fact, 0,67

These items, as necessary disbursements actually paid, like the printers' bills, are, of course, to be reimbursed to the master; and are in this instance, I believe, correctly charged.

On the whole, I find the objectionable items in the master's account, which I have pointed out, come to \$22,80, and these he has no right to retain. This amount he must still pay into court as a part of the surplus.

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DAVIS and others v. PERRINE and others.

ARCHER and MARTLING v. PERRINE and SMITH.

UNDERHILL v. PERRINE, EVANS and SMITH.

Where separate suits are brought and separate judgments obtained against maker and endorser of a promissory note, and the endorser pays the amount, he is entitled to the note and all benefit of the judgment and execution as against the maker.

Same principle where drawer and endorser are jointly sued under the statute of 1832; and an endorser of a note having to pay (on a joint judgment obtained against him and the drawer) may take an assignment from the plaintiff in the action and use it as a subsisting judgment, for his indemnification, as against the drawer.

But, where there is a judgment on a bond against co-obligors, one of them being a surety, the bond merges in the judgment, and the surety can have no redress back against the principal obligor under such bond or on the judgment.

Although a deed or assignment is set aside by a decree obtained in a judgment creditor's suit, still it should be limited to the rights of such judgment creditor, and therefore, another judgment creditor does not, necessarily, get a benefit thereby.

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1842.

Surety.
Principal
and Sure-
ty.
Promisso-
ry note.
Drawer
and En-
dorser.
Bond.
Judgment.
Fraud.
Debtor and
Creditor.
Judgment
Debtor.

EXCEPTIONS to master's report; having relation to surplus money, being a balance on a sale in foreclosure against the defendant, Robert Perrine.

This defendant, Perrine, had, on the twenty-eighth day of December one thousand eight hundred and thirty-six, made an assignment to Alfred C. Smith; having on the fourteenth day of June preceding executed a mortgage in his favor. The complainants in the second suit, Daniel O. Archer and Stephen Martling had recovered judgments against Perrine; and, on the sixteenth day of October in the year one thousand eight hundred and thirty-seven, they filed a judgment-creditor's bill, with a view to get rid of the assignment and mortgage on the ground of fraud.

And the complainant in the third suit, Andrew Underhill, on the fourth day of November in the same year, filed a similar bill with the like object.

Smith Barker, Esquire, had been appointed receiver in

these suits ; and under respective decrees therein, obtained in the months of October and December one thousand eight hundred and forty, the said assignment and mortgage were declared fraudulent and void, and the said Perrine and Alfred C. Smith were directed to release and reassign to the receiver, Mr. Smith Barker, which was done.

Among other claimants of the surplus money arising on the before-mentioned foreclosure were George Rudd and Richard L. Rudd ; and, on a reference to master Ruggles to ascertain the amounts due to claimants and as to their priorities, Messrs. Rudd put in their demand, which arose under the following circumstances : The president, directors and company of the Mechanics' and Traders' Bank, on the twenty-fourth day of November one thousand eight hundred and thirty-six, pursuant to the statute authorizing the joinder as defendants in the action of parties liable in various capacities on bills of exchange and promissory notes, commenced a suit in the superior court of the city and county of New York against the said Robert Perrine as maker and the said George Rudd and Richard L. Rudd as the endorser thereof and one William Tilden as another subsequent endorser, upon a promissory note bearing date August 3d, 1836, made by the defendant Robert Perrine in favor of the said George Rudd and Richard L. Rudd (under their style of G. & R. L. Rudd) for four hundred and fifty dollars ; and judgment was recovered and docketed on the seventeenth day of January 1837, as well against Perrine as against the Messrs. Rudd, who had received and passed away the note for value. An execution had been taken out ; and as Perrine had covered his property by the before-mentioned assignment and mortgage, G. & R. L. Rudd had to pay the amount of the execution ; and after having done so, on the fifteenth day of July one thousand eight hundred and thirty-nine, they took an assignment of the judgment from the plaintiffs therein against the said Robert Perrine.

These parties, G. & R. L. Rudd, claimed to be entitled to be paid the amount of principal and interest so paid by them on such judgment out of the surplus monies in preference to the judgment-demand of the complainants Archer and Martling, as also in preference to any rights of the re-

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ceiver ; and as this priority was not sanctioned by the master, they took exceptions to his report in the premises.

Mr. *Charles O'Connor*, for George Rudd and Richard L. Rudd.

Mr. *Smith Barker*, receiver, in *pro. per.*

Mr. *W. Silliman*, for the complainant Underhill.

Mr. *W. M. Mitchell*, for the complainants Archer and Martling.

Dec. 27.

THE VICE-CHANCELLOR :—The first question is, whether the judgment, recovered by the bank against the maker and endorsers of the note and assigned to the endorsers after they had paid it on the execution, is a subsisting judgment against the maker, and can be regarded as of any force or validity in the hands of the endorser. If the holder of a note should sue the maker and endorser separately in distinct actions and go to judgment and execution against both, and the endorser should pay the whole debt on the execution against him, there could be no question but he would be entitled to the benefit and security of the judgment and execution against the maker : upon the principle that a surety paying the debt is to be placed in the shoes of the creditor, and is entitled to the benefit of all other securities and remedies which the creditor might have : 1 Story's Eq. 477. Satisfaction of the judgment against the endorser would not be a satisfaction of the judgment against the maker, although both judgments were for the same debt. The contract of the maker and endorser, although evidenced by the same pieces of paper, are different and distinct ; the one is primarily liable—the other secondarily only. Whenever the endorser pays, he is entitled to have the note or bill delivered up to him and he may sue upon it, although there may already be a judgment upon it in the name of the former holder. The note or bill is not merged in such former judgment as between maker and payee, because the contract is different from that between maker and indorser on which

such former judgment is founded. It is not so, however, with a judgment on a bond in favor of the obligee against co-obligors, one being principal and the other a surety. There, the bond being merged in the judgment, is no longer subsisting or assignable; and if the surety is compelled to satisfy it, such satisfaction puts an end to both bond and judgment, and the surety can have no longer any benefit from either as a subsisting security: *Hodgson v. Shaw*, 3 Mylne & K. 190.

The statute of April 25, 1832, regulating suits on bills and notes and authorizing the joinder of all parties liable on the same instrument in one action, does not prevent the holder from bringing separate actions as before, and § 7 declares that the rights and responsibilities of the several parties to any such bill or note, as between each other, shall remain the same as though the act had not been passed, &c. I am, consequently, of opinion that, as between the maker and payee, the case stands on precisely the same footing as though the bank had sued and recovered separate judgments; and that paying and satisfying the execution in the hands of the sheriff by the Rudds, the endorsers, did not extinguish the judgment as against Perrine the maker and that it was competent for the bank, the plaintiffs in the judgment, to assign it as a subsisting judgment, with the benefit of any lien created by it on the property of Perrine for the indemnification of the Rudds.

The next question is: whether this judgment can be considered as forming a lien on the real estate out of which the money in court was raised by a foreclosure sale, such real estate having been assigned by Perrine, the judgment debtor, before the recovery of this or any other judgment against him, but which assignment has since been declared fraudulent and void as to creditors at the instance of other judgment creditors who filed bills and have obtained decrees to that effect and where an assignment has also been made by Perrine to a receiver? The generally received doctrine of the court is that assignments fraudulent as to creditors under the statute are not void *ab initio*, but voidable only at the instance of creditors who file bills to impeach and set them aside; and when an assignment is found to be thus fraudulent

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lent, the decree generally goes no further than to adjudge it fraudulent as to the creditor who has filed the bill and sets it aside so far as to give an opportunity of obtaining his debt and costs out of the property which was covered by it: *Henriques v. Hone*, 2 Edwards's Ch. Rep. 120; S. C. on appeal, 13 Wend. 240; *Wakeman v. Grover*, 4 Paige's C. R. 42, 43; *Hitchcock v. St. John*, 1 Hoffman's Ch. R. 522, 523. The decree, therefore, in the suits by the two judgment creditors against Perrine and his assignee would not, necessarily, vacate the assignment so as to subject the real estate to the lien of Rudds' judgment. But, there seems to be something in those two decrees out of the usual course. They declare and adjudge the assignment to be fraudulent and void and inoperative as regards the complainants in those suits and directs the assignee to release and convey to the receiver therein appointed all the right, title and interest which the assignee acquired in and to the lands, &c. of Perrine by virtue or under color of the assignment, &c.; and the receiver is then directed to convert the property into money and receive the proceeds of any sale which may have been made of the same; and that out of the property so to be received, the receivers in the first place shall "pay all just and lawful liens and incumbrances which may exist on the same prior to the lien of said judgments" (meaning the judgments on which the respective bills were filed) and in the next place that he pay the amount of the said judgment and so forth. Now, if the obstacle in the way of Rudds' judgment lien is removed by those decrees, then I think it follows that the Rudds must apply to the receiver for payment of their judgment out of the surplus money in question which the master reports the receiver is entitled to take; and that the mode of obtaining payment is not by excepting to the master's report, but by an order on the receiver if he should refuse to recognize their judgment as one of the liens provided for in the decrees. They can present a petition (under these decrees) for such an order upon the receiver; and the court will then consider the effect of the decrees and the rights of the Rudds under them. Their exceptions to the master's report must, in the mean time, be denied, with costs; and the motion made on the part of Underhill and of Archer and Martling.

the judgment creditors who have obtained the decrees for a distribution of the fund by the receiver, must stand over in order to give the Rudds an opportunity to move for leave to participate in the distribution.

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ROBINSON and others v. KETTLETAS and another.

A covenant to extend a lease which does not fix the amount of rent cannot be enforced in equity.

Where trustees under a will make a lease, with a covenant to renew for a certain term or to pay the value of erections which the tenant covenants to raise on the premises, the same to be valued by appraisers, but a new lease is refused and the present trustee will not agree to allow for the buildings and commence ejectment: the court can and will control the trustees and compel payment out of the trust estate. The power which equity has over trustees takes this case out of the usual rule which would leave a party to law.

DEMURRER to the bill.

John Gardner, by his will, after making certain bequests, devised his real estate to James Gardner, John Hyer and John Miller, trustees, upon trust, during the lives of his son and daughters, out of the rents, to uphold, support, amend and repair such real estate and pay all taxes. There were other trusts in favor of the children and their issue, coupled with power to the trustees to receive the rents.

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Covenant.
Vendor
and Ven-
dee.
Lease.
Trustee.

After the testator's decease and on the tenth day of September one thousand eight hundred and eighteen, James Gardner and John Hyer, acting trustees, made a lease of part of such estate to Robert McFarlaine for twenty-one years. Covenant therein, on the part of the tenant, to erect two substantial buildings. Also a covenant on the part of the lessors that the said trustees should and would, at the expiration of the term thereby demised, again lease, demise and to farm let the premises unto the said party of the second part his executors &c. for three years thereafter, with like covenants as were therein contained (except the cove-

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nant for renewal) and upon such rents as should be agreed upon between the parties or as should be determined upon by two sworn appraisers, one of whom to be chosen by each of the said parties, or as should be determined by a sworn umpire who should be chosen by such appraisers in case they could not agree. And the said parties for themselves, &c., did covenant with the said party of the second part, his executors, &c., that at the expiration of the term thereby demised, in case the said term should not be renewed or at the expiration of the said renewed term, if the term were renewed, they the parties of the first part would pay to the said party of the second part his executors, &c., the value of such buildings as should be erected in pursuance of the said lease, such value to be ascertained by two sworn appraisers to be chosen as aforesaid or by an umpire as aforesaid, in case the said appraisers could not agree. Covenant, on the part of the tenant, to deliver up the possession at the remainder of the term.

The buildings were erected. The defendants, Eugene Kettletas and Thomas S. McCarty, were the present trustees of the property, and the complainants were the present possessors of the lease. The bill showed that the rent had been duly paid and that, about the time of its expiration, the latter had applied for a renewal for the further term of three years, which was refused and an action of ejectment had been brought against them by the trustees.

The complainants insisted that they were entitled to such renewal, and, if the terms could not be fixed, then they claimed the value of the erections. Prayer accordingly; and for an injunction to restrain the action of ejectment.

General demurrer interposed.

Mr. *G. B. Butler* and Mr. *Lord*, in support of the demurrer.

Mr. *Leveridge*, for the complainants.

Dec. 27. THE VICE-CHANCELLOR:—This bill is filed for a two-fold object: an extension of the lease for three years, accor-

ding to the covenant in the original lease ; and, for payment of the value of the house built on the lot.

With respect to the first : I am inclined to think that the covenant is not such as this court could undertake to see specifically performed, because the rent for the renewed or additional term of three years was not fixed, but left open to be agreed upon between the parties or to be determined by arbitration : see the cases on this subject referred to by the Assistant Vice-Chancellor in *Whitlock v. Duffield*, 1 Hoffman's Ch. R. 110. That branch of the case, however, it has become unnecessary to consider, for the three years have now expired.

Then, as respects the covenant to pay for the value of the buildings. The objection goes to the want of power in the lessors, being trustees under the will of John Gardner, deceased, to grant a lease, with a covenant to pay for improvements. There is not in the will an express power to make leases ; but such a power is, necessarily, implied from the devise of the whole estate to the trustees and from the nature of the trusts they are to execute. It is incident to the estate vested in the trustees and is in conformity with the trusts that the property should be leased out to the best advantage. The bill contains enough to show that leases for twenty-one years, with covenants on the part of the lessees to erect substantial buildings for respectable family residences, and on the part of the trustees to pay for such improvements at the end of the term, was a judicious exercise of the power, and, in its results, of great benefit and advantage to the estate. I concur with Chancellor Kent in a written opinion given by him to the trustees on this point. The covenant is, at any rate, binding in law upon the persons who executed the lease. And the next question is, whether it is such a covenant as this court can take cognizance of and undertake to enforce. It is an absolute covenant to pay at the expiration of the lease "the value of such buildings as shall be erected in pursuance of the lease ;" and it then provides how such value shall be ascertained, that is by sworn appraisers to be chosen by the parties and through an umpire, if necessary. The bill shows that the present trustees, the defendants, have refused to appoint any appraiser or to pay ; that they receiv-

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ed the rent under the original lease to the end of the term of twenty-one years thereby granted; and then took legal measures to obtain possession of the lot with the dwelling house upon it, erected by the lessee. They are thus taking to themselves, as trustees, the benefit of the tenant's improvement without paying for it, and this court is asked to interpose and compel them to do justice. We are not now dealing with the persons who executed the lease against whom there might be a remedy at law, but with the trust estate itself and the persons who now represent it and over whom this court has peculiar and exclusive jurisdiction.

This court can ascertain the value and amount to be paid and direct its payment out of the trust estate. And I think that this case may be distinguished from the class of cases in the books where the court has refused to entertain a bill for specific performance of a covenant or agreement where the rent or terms of a lease or the price has not first been ascertained in the mode pointed out in the contract.

I must overrule the demurrer, with costs, giving liberty to answer.

MERIAM v. HARSEN *et al.*(a.)

Certificate of acknowledgment, signed by a master in chancery, upon a deed dated 29th May, 1790, executed by a married woman of her estate showed, on a private examination, that she "acknowledged she executed the same without any fear, threat, or compulsion of her husband." The statute of 1788 declared, that no estate of a *feme covert* should pass without a previous acknowledgment by her on a private examination, &c., that she executed such deed freely, without any fear or compulsion of her husband. *Held*, in the absence of proof of fear, threat, or compulsion, that there was a substantial compliance with the statute, and that the certificate was to be presumed sufficient.

Although a bill in partition states that certain property belongs to husband and wife, and the decree follows the bill, yet, as an accounting was connected with the suit which justified the making of both of them parties, it was not to be considered that these statements created an estoppel as to the

(a) Affirmed on appeal, 6th April, 1847.

real rights of these parties, and that the husband alone might, notwithstanding, be seized of a fee.

A wife may, without the intervention of a court, convey away her estate to a stranger or to her husband by circuitry; but chancery will scrutinize the act closely, to see that she has not been circumvented, coerced, defrauded, or unduly influenced.

On the 28th May, 1790, husband and wife, for a nominal consideration, conveyed the estate of the wife to G. F., who, by deed dated the next day, also for a nominal consideration, conveyed the property to the husband in fee. Deed recorded. Afterwards the husband alone made long leases, still living in harmony with his wife, and she, with others, executed certain articles dated in Feb. 1809, in which there was a recital and declaration recognizing the fee in the husband; there was nothing to show but the act was a free will offering by the wife; the transaction had been suffered to stand for about forty-five years unquestioned and undisturbed; and both husband and wife were dead: *Held*, a valid deed.

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v.
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PRIOR to the twenty-eighth day of May, one thousand seven hundred and ninety, Mrs. Catharine Harsen, the wife of Jacob Harsen, was seized in fee of certain real estate.

The bill in this suit was filed to set aside a deed of it made the twenty-eighth day of May in the said year one thousand seven hundred and ninety, (for the consideration of five shillings,) by the said Jacob and Catharine Harsen to Gabriel Furman and, in that way, also, destroy a deed dated the day after (the twenty-ninth day of May, 1790,) whereby the said Gabriel Furman, in consideration of ten shillings, reconveyed to the husband only, Jacob Harsen, the said property in fee. The principal grounds taken against the first mentioned deed from the said Jacob Harsen and Catharine his wife, were, that she, Catharine, had not properly acknowledged it under the then statute; and, that her genuine signature was not to it; or, if to it, that some fraudulent means had been used to obtain it. There was likewise a seeming attempt to affect the will of Jacob Harsen.

It was also made a strong point in the suit that Mrs. Catharine Harsen could not, by the above means, during coverture and for a mere nominal or no consideration, thus make, in effect, a gift of her estate to her husband.

The certificate of acknowledgment upon the deed of the twenty-eighth day of May, one thousand seven hundred and ninety, (executed by Catharine Harsen and her husband,) was in these words: "Be it remembered, that on the twenty-ninth day of May, in the year of our Lord one thou-

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Statute.
Estoppel.
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sand seven hundred and ninety, before me, John Ray, one of the masters in chancery for the State of New York, personally appeared Jacob Harsen and Catharine his wife; and the said Jacob Harsen acknowledged he sealed and delivered the within written indenture as his voluntary act and deed for the uses and purposes within mentioned; and the said Catharine, being examined by me privately and apart from her husband, acknowledged she executed the same without any fear, threat or compulsion of her husband; and I having perused the said indenture and finding therein no material errors or interlineations (except the words 'feet six' on the fifty-eighth line, same page interlined) do allow the same to be recorded."

"JOHN RAY."

This deed was recorded the twenty-fourth day of May, one thousand seven hundred and ninety. Catharine Harsen died on the eighth day of May, in the year one thousand eight hundred and thirty-five; and her husband Jacob Harsen departed this life on the twenty-fourth day of July, in the same year.

The bill insisted that the said Catharine Harsen never acknowledged she executed the said deed *freely*, as was required by the then law of the state.

A partition suit, in which the said Jacob Harsen and Catharine his wife were parties, was attempted to be made to bear upon the present proceedings, so far as to raise a presumption of understood ownership in Mrs. Harsen, after the date of the said deed to Gabriel Furman; and certain articles of agreement, having reference to the partition property, was used to negative the presumption of her after ownership. All this sufficiently appears in the opinion of the court.

A mass of testimony was taken in the suit, but, as the only two interesting points were, as to the sufficiency of the acknowledgment under the then statute, and how far the wife, Catharine, could thus pass over her estate to her husband, it is deemed unnecessary here to do more than merely (with the above explanation) give the opinion of the court.

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Mr. *W. S. Johnson*, for the complainant.

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Mr. *George Wood*, for the defendants whose interests were identified with those of the complainant.

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Mr. *J. W. Gerard*, for the defendant Jacob Harsen.

THE VICE-CHANCELLOR.—The first question to be considered is, as to the sufficiency of the acknowledgment by Catherine Harsen, the wife, of the deed of conveyance from herself and husband to Gabriel Furman, of the twenty-eighth day of May, one thousand seven hundred and ninety, to pass her estate?

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The statute of one thousand seven hundred and eighty-eight, then in force, (2 Greenl. 99,) declares, that no estate of a *feme covert* shall thenceforth pass by her deed, without a previous acknowledgment by her, on a private examination apart from her husband, that she executed such deed *freely*, without any fear or compulsion of her husband, endorsed on the deed conveying the same, and signed by the person before whom such acknowledgment shall be made.

The certificate of John Ray, a master in chancery, endorsed on this deed, states, that, on the twenty-ninth day of May, one thousand seven hundred and ninety, the parties personally appeared before him, Jacob Harsen, (the husband,) acknowledged that he sealed and delivered the instrument as his voluntary act and deed for the uses and purposes therein mentioned, and the said Catherine (the wife) being examined by him privately apart from her husband, acknowledged she executed the same without any fear, threat or compulsion of her husband; and that he (the master) having perused the deed, and finding therein no material erasures or interlineations (except one noted) did allow the same to be recorded; and the deed was accordingly put on record in the month of August following.

The omission of the word "freely" in the master's certificate of acknowledgment presents the only objection to it. Every thing else is there that the then statute required.

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The private examination of the wife—her confession that she executed the deed without any fear or compulsion of her husband, and, moreover, without a threat of any sort from him—and all this endorsed on the deed and signed by the master, appears. But it does not appear that she was asked whether she executed the deed “freely;” or if she was, and so acknowledged, the master has omitted to certify it in terms. Is this omission material? In the absence of fear, threat or compulsion, must it not be implied that it was a free and voluntary act within the meaning of the statute?

The statute prescribed what the certificate should purport—not the form of it, nor the exact words it should contain; and an act done without fear, threat or compulsion seems to carry with it freedom from restraint, coercion or undue influence. How far a married woman may be influenced by motives of generosity or affection towards her husband, or by a desire to promote his interests in parting with or incumbering her real estate for his benefit, is not the question under this provision in our statutes. Such motives and inducements may exist, and probably tend to actuate married women in a great majority of instances where they consent to dispose of or incumber their estates, or are called upon to join with their husbands in executing conveyances; but, so long as it is the policy of the law to allow them to do so at all, the law must admit such motives or inducements to prevail to a considerable extent. I can hardly think it was or is the object of the statute to guard women against the influence of such generous motives, because they are not thereby necessarily disqualified as free agents from exercising the power of refusal, when they are not perfectly satisfied that it will be for their own or their husband’s interest to dispose of their property by deed. The word freely, therefore, as used in the statute, must have reference to something else than this natural or habitual influence which a husband may be permitted to acquire over his wife, and against which she stands in need of no protection. It must have reference to that which amounts to restraint upon a wife’s actions—to coercion by undue means—to over persuasion, or some im-

proper influence brought to bear upon her mind, which leaves her no longer the freedom to act as she may think proper; and the absence of all such improper means may well enough be inferred when a wife, removed from the immediate presence of her husband, and having an opportunity to express a dissent, or having a reluctance to join in the deed, is, not only silent, but acknowledges she is laboring under no fear, nor influenced by any threat or compulsion.

Our courts have not been strict in requiring a very close adherence to the words of the statute in certificates of acknowledgment of deeds and mortgages, lest it might involve much litigation and tend to disturb or unsettle many titles. They have been disposed to take some things for granted which did not appear, and to allow what seemed to have grown into a usage or settled practice of judges and other officers authorized to perform this duty to have great weight in giving effect to and fixing the construction of the statute; and where there has been a substantial compliance with its form, it has been held sufficient: *Troup v. Haight*, Hopk. R. 239; *Jackson v. Gumaer*, 2 Cowen, 552; *Thurman v. Camerra*, 24 Wend. 87.

There are a great number of deeds on record where the word "freely" is omitted in the certificate of acknowledgment. Some hundred of instances are produced in evidence in this cause, to show the practical construction which has been given to the statutes, in former times, by judges of eminence in their day, and men of great experience and of correct business habits, who were then entrusted with the performance of this duty. Besides, it is a fair presumption that those who have been appointed to guard the rights of married women against the improper conduct of their husbands, when they come to acknowledge deeds, and which acknowledgments are essential to the validity and effect of the instruments, have performed that duty honestly and correctly, by requiring such an acknowledgment as the statute requires, although in the certificate endorsed a word may be wanting. In *Jackson v. Gilchrist*, 15 Johns. R. 89, Mr. Justice Thompson, in delivering an opinion, held, that the court would presume, after a considerable lapse of time, that the officer taking an acknowledgment of

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a *feme covert*, had privately examined her apart from her husband, because it was his duty to have done so, although his certificate did not state the fact.

Again, as to the sufficiency of the certificate, and the manner of the acknowledgment, it is purely a question of law. That question upon the deed now in controversy has been presented to and been passed upon by a court of law of competent jurisdiction and authority to determine it. In an action of ejectment brought in the superior court against the complainant in this cause, by some one or more of these defendants, in which the plaintiffs therein claimed title under this very deed, an objection was taken to it on the ground of the insufficiency of the acknowledgment by Catherine Harsen, the wife, to pass her title; and upon a case reserved, the point was argued and considered by that court, and the objection over-ruled, and judgment was rendered in favor of the title derived from this deed. This judgment of a court of law upon the point, standing unreversed, and for any thing that appears to the contrary acquiesced in, has the force of authority which is binding upon the parties, and which the court of chancery could hardly feel itself at liberty to dissent from. I think the question must be considered as put at rest; and that the manner and form of the acknowledgment of the deed, as certified by John Ray, the master, was sufficient, so far as the ceremonial is concerned, to pass the title and estate of the wife.

The next objection taken by the bill to the deed in question, is, that it is a forgery, or if not actually forged, that the wife's signature and her apparent consent to it, have been obtained by some fraudulent means. There is not the least ground on which to raise the slightest suspicion that the instrument is a forgery; and with regard to the manner of obtaining it, not a particle of evidence is produced to support such an allegation. On the contrary, the circumstances which must have attended the transaction, all go to prove that fraud or concealment of the object and purpose of the deed could hardly have been practiced upon the wife, unless, indeed, we are prepared to believe, without proof and contrary to all probability, that two respectable citizens, who became the subscribing witnesses, the master in chancery,

who took the acknowledgment and who certified that he had perused the instrument and Gabriel Furman, (the grantee,) and his wife, also, who joined with him in an immediate reconveyance, all entered into a base conspiracy with Jacob Harsen, to cheat his wife. The character of the parties forbid such a supposition. Mrs. Harsen was, moreover, a woman, possessing, at least, ordinary, if not more than ordinary intelligence and understanding. She was a woman, too, of some education, for she wrote her name in full to the deed; and from the character which is given of her by the witnesses, she had a very considerable knowledge of business in relation to property. She was not, therefore, a woman likely to be imposed upon or very liable to be drawn in to execute any deed, the object and purport of which she did not fully comprehend. The simultaneous execution of the conveyance and reconveyance, as is evident from an inspection of the two instruments, must have brought Harsen and his wife and Furman and his wife together by previous appointment; and it is impossible to suppose that people of their habits and character could have met, upon so unusual a business, without conversing on the subject of their meeting and knowing what they were going to do. Under such circumstances, there could have been no mystery or concealment of each other's purposes—all must have understood it, although, at this distance of time, Mr. Furman's memory fails him as to anything that was said or done on the occasion.

But, it is contended, that the deeds never took effect so as to pass the title—were never delivered—remained in escrow, or as mere dead letter instruments, and were never acted upon during the joint lives of Harsen and his wife, or if of any effect to vest the title in the husband beyond his mere marital right that he held it as naked trustee of the wife and that this court is bound so to regard him. Various facts and circumstances are adduced in evidence upon which this view of the case is attempted to be supported; such, for instance, as the wife's management to some extent of the property, as if it had been still her own—superintending the garden and the marketing of its produce and taking the proceeds to her own use—talking of the houses

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in Mott-street, while they were being built, as if she were building them out of her separate means; and frequently pointing out which of her grand-children she intended should have particular houses and other pieces of property.

Declarations and acts like these cannot, however, be allowed to have the effect of annulling the deed or of raising a trust under it in favor of the wife. Living all the time in perfect amity with her husband, it was natural for her to speak and act as though she still had an interest and ownership in the property, for she could not but feel, under such circumstances, that whatever belonged to her husband belonged to her. All this is, therefore, easily reconcilable with the fact that the legal title and estate was, nevertheless, exclusively in him.

But the testimony from which such inferences, in favor of the idea that she had not intentionally relinquished all title to the property is drawn, is more than counterbalanced by the facts which appear on the other side. Numerous leases are produced which Jacob Harsen granted in his name alone, for absolute terms of years, that might have extended beyond his estate by the curtesy, and having no reference to his own life individually or the joint lives of himself and wife; showing very clearly that they were based upon the title which he had previously acquired from his wife, being for parcels of the property conveyed by the deeds in question.

There is another piece of evidence, however, which is calculated to show that Jacob Harsen himself considered he held the property in right of his wife, notwithstanding the deeds. I refer to the proceedings and decree in the partition suit commenced by the filing of a bill in chancery in the year one thousand seven hundred and ninety-four, in which Jacob Harsen and his wife were co-complainants with others. This bill does, indeed, state that Harsen and wife were seized in right of the wife; and the decree made in the cause in the year one thousand eight hundred and eight follows the bill in that respect and adjudges that share of the estate to be thus held;—neither the bill nor the decree making any mention of the conveyance through Furman to the husband.

As to the effect which this proceeding is to have on the rights of the husband, (for it is contended that, by the decree, he is estopped from denying that, at that time, he held the property in right of his wife,) it may be observed that the bill was filed without the oath or even the signature of any person, except the solicitor and counsel whose names are subscribed to it. The bill is to be regarded, therefore, as a mere pleading, and, in framing it, the solicitor probably deemed it unnecessary, for the purposes of a partition and settlement among the Cozine family, of which Mrs. Harsen was one, to set out the conveyances by which her husband had become seized in his own right, or to state the change which had taken place in that particular, because it was a matter not affecting the rights of the other tenants in common. Even if it had been stated, it would not have dispensed with the necessity of making Mrs. Harsen a party to the suit in conjunction with her husband. A partition of the real estate was not the sole object of the bill ; an additional object was, the settlement of accounts between all the parties in relation to the rents and profits of different parcels of the estate which they had severally possessed and enjoyed for a long series of years, and, especially, to call the widow and heirs of Balm Johnson Cozine to an account in relation to the possession of a deceased brother's share which he had entered upon and held ; and more especially still, to establish a claim in favor of Jacob Harsen and his wife, as representing her deceased father, Garrett Cozine, for money which they had been compelled to pay in the year one thousand seven hundred and eighty-six in discharge of a debt originally of Balm Johnson Cozine and his deceased brother Cornelius, for which his brother had become surety and which it was claimed the widow and children of Balm Johnson Cozine, by virtue of the property descending or coming to them, were bound to pay or contribute to the payment of.

This showed the necessity or propriety, at least, of making Mrs. Harsen a party to the suit conjointly with her husband ; and being a necessary party, it is easy to see how counsel may have advised and probably did advise that no notice should be taken of the change in the title of her share of

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the real estate in drawing the bill, and that their rights should be stated as they originally existed for the sake of simplifying the proceedings as much as possible; leaving the decree to enure to the husband's benefit according to the deeds between them. The decree was made to follow the bill in that respect, declaring the husband and wife to be seised of one-fourth of the estate in right of the wife; but, from what subsequently took place, it is very evident that this declaration in the decree was regarded as mere matter of form as between the husband and wife. The decree was but interlocutory in its nature; and it appears to have been abandoned shortly after it was made, by an agreement for a compromise and settlement entered into by all the parties. Articles of agreement were drawn up and executed under their hands and seals on the ninth day of February, one thousand eight hundred and nine. This instrument recites the pendency of the chancery suit; and states that, so far as the property on Broadway and Fair-street was concerned, the matter was compromised in such manner that, by the mutual consent of the parties, one undivided fourth part thereof was admitted and agreed to belong to Jacob Harsen, one other undivided fourth part thereof to Lettice, the wife of Peter Hegeman, and so on with other fourth parts. It then provides that the property should be sold at auction and the net proceeds divided in the following manner: one equal fourth part should be deemed to belong and be paid over to Jacob Harsen; one other fourth part to Peter Hegeman and Lettice his wife, in right of the said Lettice; and so with other shares held by married women, the money was to be paid over to their husbands in right of the wives. Not so, however, with Mrs. Harsen. Her husband was declared to be the owner of the share which had belonged to her, and the money was to be paid to him, not in her right, but in his own without any qualification. Mrs. Harsen was a party to this instrument; she is named in it and she executed it under hand and seal, and, what is more, acknowledged the execution on the day of its date before an officer authorized to take the acknowledgment of deeds, as did all the other parties to the instru-

ment, and in a manner to pass real estate of married women as well as other persons.

The next is a deed of mutual release and quit claim of the same date (the ninth day of February, one thousand eight hundred and nine,) in which Mrs. Harsen unites with her husband, and whereby all the parties to the chancery suit released each other from all personal claims and demands; and this is followed by another deed of the same date, and simultaneously executed and acknowledged, by which all the other parties interested in the Cozine estate quit claim to Jacob Harsen solely, in his own right and not in that of his wife, certain parcels of Bloomingdale property which had long previously been set apart to his wife in the division of the estate and which are conveyed by the Furman deeds. To this last instrument Mrs. Harsen was not a party, but it is a fair inference that she was present when it was executed and assented to its being made to her husband alone.

These things show that, when the parties came to act for themselves in so important a matter as that of executing solemn instruments under seal which were to put at rest all questions in relation to their respective ownerships and personal liabilities, the legal rights of Jacob Harsen, as acquired by the Furman deeds, were not lost sight of, however differently those rights may have been treated in the chancery proceedings. These instruments were drawn in strict accordance with the title which, in fact, he held; and it must be presumed they were so drawn with full understanding and acquiescence of his wife.

I am now brought to consider another view of this case as presented and contended for by the senior counsel who argued for the complainant, viz. that there has been a gift of the wife's entire estate to her husband without consideration—or but a nominal one—during coverture; that it was an improvident disposition of the wife's property, to say the least of it; and inasmuch as it is the policy and duty of this court to protect persons against the consequences of their acts done in favor of others standing in a confidential relationship towards them, the transaction in question cannot stand in the broad sunshine of a court of equity.

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There is, certainly, no positive prohibition in law or in doctrine or principles of this court to prevent a married woman from parting with her property even by way of gift to her husband. Where she has property, either real or personal, settled to her separate use or secured as her separate estate, she may part with or relinquish it in favor of her husband or dispose of it as she pleases to other persons, unless restrained by some express clause in the deed or will from so doing: *Pawlet v. Delaval*, 2 Vesey Senr. 663, before Lord Hardwicke; *Pybus v. Smith*, 3 Bro. C. C. 340, and *S. C.* 1 Vesey, Jr. 189, before Lord Thurlow; *Rich v. Cockel*, 9 Vesey, 369; and *Parker v. White*, 11 Vesey, 222, before Lord Eldon, are all cases in which it is admitted that gifts by the wife to the husband of her separate estate may be made, in the absence, of course, of fraud, coercion or undue influence, and that the natural influence resulting from the marriage which every husband may be supposed to have acquired is not a sufficient ground for invalidating them.

It is true that, in some cases, where a married woman is proceeding to part with a separate property or to relinquish separate interests which are held subject to the supervisory power of this court, she may be required to give her consent upon a personal examination in court or before one of its officers; although it would seem that such an examination is not always deemed indispensable: See Sir Wm. Grant, M. R., in *Sturges v. Corp*, 13 Vesey, 190. If, then, in cases of a separate estate or where she has equitable property it is competent for her to part with it by way of gift to her husband, where she is not prevented by a clause against anticipation, why may she not relinquish or give up to her husband property of which the legal title and estate is held in her right?

Property thus held is, surely, not considered more sacred or regarded with higher favor by a court of equity in respect to the rights and interest of a *feme covert*, than property which has been bestowed upon her expressly for her separate and exclusive use and with direct reference, perhaps, to the protection which such a court can afford to it. No—she is just as competent to part with the one as with

the other. There can be no difference in principle or in reason with respect to her power and right to do so. The form and manner of doing it may be different. She can make no valid conveyance or transfer of property during the coverture of which the legal title was or is in her, except by the joint deed of herself and her husband. His assent and concurrence is necessary, because of the joint seisin which he acquires by the marriage. In order to part with her title to property thus held, no previous act or permission of this court is requisite. Her consent is not to be obtained on a private or personal examination in chancery. There is no case in which it ever has or can be required when a married woman is about to dispose of her real estate not settled to her separate use. The statute law of the state has provided another and effectual mode of doing it:—she and her husband have only to unite in executing and acknowledging a deed before a commissioner or other officer, in the manner prescribed by the statute; and, whether such deed be made to a stranger or to the husband by circuitry, she is equally competent to make it. The case of *Jackson v. Stevens*, 16 Johns. R. 110, is in point to show that a good title may pass and vest in the husband, of a wife's land, by just such a circuitry of conveyance as was adopted in this instance. All that the court of chancery can do, in such cases, is, to view the transaction with an eye of suspicion and jealousy and scrutinize it closely. If it finds that the wife has been circumvented, coerced, defrauded or unduly influenced into the measure, it can, then, interfere, but not otherwise. I have sought in vain for facts or circumstances to justify such an interference in this case. Nothing appears to my mind by which I can view the transaction in any other light than as a pure free will offering by the wife to the husband, and it is due to the good name which these people both deservedly enjoyed during a long life, and which they left behind them as part of the inheritance to their grand-children, (between whom this controversy has arisen,) to believe that it proceeded from just and generous motives on her part, and not from unworthy and selfish ones on the part of her husband.

The transaction has been suffered to stand for a period

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of about forty-five years unquestioned and undisturbed ; not even the expression of a regret or of a wish to the contrary from either of the parties has been heard ; and, in my judgment, it would be almost like sacrilege now to disturb it.

The bill in this cause has, likewise, attempted to impugn the will of Jacob Harsen ; but, upon the hearing, not a question or a point has been made against its validity.

Every ground, therefore, upon which the bill was filed, appears to have failed the complainant ; and it must, consequently, be dismissed, with costs.

RUSHMORE and another, Receivers, v. MILLER, GRACIE and others.

A surety of a mortgage is not entitled to any notice or demand before making him a party with a view to fix him.

July 6,
1843.

Pleading.
Mortga-
gor and
Mortga-
gee.

BILL to foreclose a mortgage. The defendant, William R. Gracie, was the mortgagee, but he had assigned the mortgage, with a guarantee. He demurred to the bill. His counsel, Mr. *Rockwell*, took the ground that the bill did not allege that the amount due on the mortgage had ever been demanded of the mortgagor before suit brought, nor was any excuse shown upon the face of the pleading for not having demanded it ; and he referred to *The Mechanics' Fire Ins. Company v. Ogden*, 1 Wendell's R. 137 ; *Morris v. Wadsworth*, 11 Ib. 100.

Mr. *D. S. Jones* contended that the doctrine in *The Mechanics' Fire Insurance Company v. Ogden* was not law ; that Chief Justice Savage there referred to a case (*Bank of New York v. Livingston*, 2 J. C. 409) which did not support his honor's views ; and that the case of *Douglass v.*

Howland, 24 Wend. 35,(a) contained the true doctrine and upset the demurrer.

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Mr. *Rockwell*, in reply. The case of *Morris v. Wadsworth* recognizes that of *The Mechanics' Fire Insurance Company v. Ogden*; and the doctrine in *Douglass v. Howland*, only decides that notice to the surety is unnecessary and does not show that a demand can be dispensed with.

THE VICE-CHANCELLOR decided that a surety, in such a case as the above, could not claim notice or a demand; and might be introduced as a defendant to fix him for any deficiency, without it.(b)

(a) See this case of *Douglass v. Howland* commented upon and explained in 4 Hill's N. Y. Rep. 119; see also same vol. at p. 522, the case of *Jackson v. Griswold*.

(b) Although the late case of *Gillett v. Balcom*, 6 Barb. S. C. Rep. 370 has reference to a mortgage made on demand, yet it may be well to refer the reader to it.

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IN THE MAT-
TER OF KIP.IN THE MATTER OF THE PETITION OF KIP, TRUSTEE,
&c., v. THE RECEIVERS OF THE MUTUAL FIRE IN-
SURANCE COMPANY.

Where a mortgagee properly holds a policy of insurance on mortgaged pre-
mises and the mortgagee sells subject to the mortgage, but the policy re-
mains in the mortgagor's name (assigned to the mortgagee) without the
buyer having had it in any way changed, and a fire happens: the mort-
gagee, on claiming from the insurance company, should permit the insu-
rers to take an interest in the mortgage to the extent of the fire claim, and
the buyer could have no benefit of it in any other way.

July 18,
1842.

*Vendor
and Pur-
chaser.
Mortga-
gor and
Mortga-
gee.
Insurance.
Policy.*

THIS case came before the court on the following peti-
tion of Isaac L. Kip, trustee, &c. :—

“ Respectfully sheweth, &c.—that on or about the first
day of October in the year one thousand eight hundred and
thirty-two, Anson Blake, of the city of New York, being
seized in fee of the lot of land and premises in the city of
New York known as No. 4 William street, with the five
story brick store then standing thereon, borrowed of your
petitioner, as trustee as aforesaid, the sum of ten thousand
dollars, and to secure the repayment thereof made and exe-
cuted to your petitioner, as trustee as aforesaid, his four several
bonds or obligations, all bearing date on the said first day
of October in the year aforesaid, and each conditioned for the
payment of the sum of two thousand five hundred dollars
on the first day of October in the year one thousand eight
hundred and thirty-seven, with interest at the rate of six
per cent. per annum payable half yearly; that the said An-
son Blake, at the time of the making and delivery of the said
four bonds and for the purpose of securing the repayment
thereof did, together with his wife, make, execute and deli-
ver to your petitioner, as trustee as aforesaid, a certain in-
denture of mortgage bearing even date with the said bonds,
conveying to your petitioner, as trustee as aforesaid, in fee,
by way of mortgage, the aforesaid lot of land No. 4 William
street, with the buildings erected thereon—which said mort-
gage contains a clause in the words and figures following—
that is to say: ‘And further, that at all times hereafter,

"until the payment and discharge of the said several sums of money mentioned in the conditions of the said several bonds or obligations and the interest thereof, he, the said Anson Blake, his heirs, executors, administrators and assigns will have and keep the buildings erected or to be erected on the above described lot of ground and premises sufficiently insured against fire in some competent fire insurance company in the city of New York, such as shall be satisfactory to the said party of the second part, his executors, administrators or assigns ; and will, by way of further security, assign the policy and policies of insurance to the said party of the second part, his executors, administrators and assigns ; and that he, the said Anson Blake, his heirs, executors, administrators or assigns shall and will pay all such taxes, assessments and payments as may be lawfully laid or imposed upon the above granted lot, piece or parcel of land—and in case of his or their neglect or refusal so to do, it is hereby mutually covenanted and agreed by and between the parties to these presents, that the said party of the second part, his executors, administrators or assigns may insure the same in a sufficient manner in his and their own names, but at the proper costs and charges of the said Anson Blake, his executors, administrators and assigns, and continue such insurance, from time to time, until the payment of the several sums of money mentioned in the conditions of the said bonds or obligations, and also pay such taxes, assessments and payments as may be imposed on the said premises as aforesaid ; and the said several bonds or obligations and this present indenture of mortgage shall operate as a security for the repayment of such premiums of insurance and taxes, assessments and payments and the interest thereof respectively : —and that the said bonds and mortgage have been ever since they were respectively executed and still are in full force and effect and unsatisfied, either in whole or in part, except as to the interest which has become payable thereon. And your petitioner further shows that, on the said first day of October in the year one thousand eight hundred and thirty-two, the said Anson Blake effected a policy of insurance in the usual form with the Mutual Insurance Company of the city of New York, for the sum of four thousand dollars

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on the aforesaid store standing on the lot embraced by the said mortgage; and that, on the second day of the said month of October in the year last aforesaid, the said Anson Blake, in pursuance of an agreement to that effect made at the time when the said loan was effected and by and with the written consent of the said company, endorsed on the said policy, assigned in writing and delivered the said policy to your petitioner as a further collateral security for the payment of the said bonds; that the said policy of insurance hath ever since been and still is in the possession of your petitioner under and by virtue of the said assignment. And your petitioner further shows that the said policy of insurance was continued for the further term of one year, from the first day of October in the year one thousand eight hundred and thirty-three, by a certificate in writing bearing that date and made and executed by the said company. And for the further term of six months and seventeen days from the fourteenth day of October in the year one thousand eight hundred and thirty-four by a certain other certificate in writing, bearing the said last mentioned date and made and executed by the said company—a copy of which said policy and consent, &c. &c. And he further shows that the premiums of insurance on the said policy and on the said two several renewals thereof were paid to the said company by the said Anson Blake as your petitioner believes; and that the said two several certificates of renewal were, at or about the time they respectively bear date, delivered to your petitioner as and for such further collateral security as aforesaid and ever since have been and still are in his possession for that purpose. And your petitioner further shows that, on or about the fifth day of February in the year of our Lord one thousand eight hundred and thirty-five, the said store, so insured as aforesaid, was totally destroyed and rendered valueless by fire, originating, as your petitioner is informed and believes, in a neighboring building: and that the damage thereby sustained exceeded, as your petitioner also verily believes, the said sum of four thousand dollars. That your petitioner, thereupon, caused due notice of the said loss in writing to be given to the president of the said company; and afterwards, as your petitioner is informed and believes,

the preliminary proofs of loss required by the said policy were delivered to the said company. And your petitioner further shows that, as he has been informed and believes, the said The Mutual Insurance Company of the city of New York was an incorporated insurance company in the city of New York within the true intent and meaning of the act of the legislature of the State of New York, entitled, "An act for the more convenient adjustment of the affairs of certain insurance companies in the city of New York rendered insolvent by the late fire in that city," passed January 18, 1836; and that the said company, as your petitioner is informed and believes, was rendered insolvent by the said fire which occurred in the city of New York on the sixteenth and seventeenth days of December in the year one thousand eight hundred and thirty-five; and that, under and by virtue of the said act and pursuant to the provisions thereof, George Ireland, John Oothout and Robert Benson were, on or about the twenty-second day of February in the year one thousand eight hundred and thirty-six, as your petitioner is informed and believes, duly constituted and appointed and ever since have continued to be and now are receivers of the estate and effects of the said The Mutual Insurance Company of the city of New York pursuant to the provisions of the said act and the act therein referred to; and that the said receivers, as your petitioner is also informed and believes, have recently declared, out of the assets of the said company, a dividend of eighty per cent., on all admitted and liquidated claims upon the said company and, in various instances, have paid the same to persons entitled thereto. And your petitioner further shows, that, as he is informed and believes, the said company always admitted that the loss and damage occasioned by the fire herein first above referred to, to the said insured store, exceeded the sum of four thousand dollars; but that the said company, before its said insolvency, refused to pay the said loss: except on certain conditions with which your petitioner is advised that he ought not to comply and the said receiver of the said company, since their said appointment, although, as your petitioner is informed and believes, one of them has been applied to for that purpose at the office of the said receivers, have not issued their

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certificate therefor or paid the same or any dividend thereon:

Wherefore your petitioner prays, that the said George Ireland, John Oothout and Robert Benson, as such receivers as aforesaid, may, by the order of this honorable court, be compelled to issue to your petitioner, as such trustee as aforesaid, their certificate for the amount of the aforesaid loss, discharged from any condition or obligation whatever, except such as may be common and applicable to all other admitted creditors and claimants and to pay to your petitioner the aforesaid dividend of eighty per cent. on the said amount and to make and pay to him such further dividend or dividends thereon as may hereafter be declared and paid on the admitted claims against the said company. And also your petitioner's costs and charges on this petition to be taxed. Or, for such other and further relief in the premises as to your honor may seem meet and proper and as may be consistent with equity and good conscience. And your petitioners, as in duty bound, will ever pray, &c."

(Signed and sworn to.)

This petition was met by the following affidavit of the receivers of the Mutual Insurance Company—"George Ireland, John Oothout and Robert Benson, being duly sworn, severally depose as follows: George Ireland maketh oath that, at the times mentioned in the petition of Isaac L. Kip, he was president of The Mutual Insurance Company therein named. That, upon examination, made on behalf of the said company in relation to the loss by fire therein mentioned, it appeared that Anson Blake, prior to the fire in the petition mentioned and on the thirty-first of December, eighteen hundred and thirty-four, entered into a contract for the sale of the said premises to John Bloodgood, a copy of which, as the officers of the said company ascertained from the said Anson Blake, is as follows: 'Anson Blake agrees to give J. Bloodgood ten thousand dollars for his interest in the Van Cleef property and nine hundred per lot for twenty lots on Atlantic street Pacific and Gerretson, the following numbers: 255, 256, 257, 258, 269, 270, 271, 223, 224, 225, 280, 281, 282, 283, 294, 295, 296, 248, 249, 250, payable as follows—the store No. 4 William street at \$25,000; bond and

mortgage of J. E. Underhill payable 1st August 1835, for four thousand dollars and his note at six per cent. interest on the whole calculation to be considered cash 1st February 1835.

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'JOHN BLOODGOOD,
'ANSON BLAKE.

'New York, Dec. 31, 1834.'

"The officers of the said company further ascertained, by the records of conveyances in the city of New York, that the said store, insured in the said policy, was conveyed by Anson Blake and his wife to William Bloodgood, by deed bearing date the twentieth day of January in the year of our Lord one thousand eight hundred and thirty-five expressed to be in consideration of twenty-five thousand dollars paid to the grantors, duly acknowledged on that day, and recorded the eighteenth day of March of the same year, in which deed it was contained, in relation to the aforesaid mortgage on the lot to Isaac L. Kip in the said petition named, as follows :
'To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part his heirs and assigns, to his and their own proper use, benefit and behoof for ever. Subject to the payment, as part of the consideration money hereinbefore mentioned, of a mortgage on the premises hereby conveyed, given by the parties hereto of the first part to Isaac L. Kip, trustee, &c. for ten thousand dollars and interest thereon accruing at six per cent. per annum payable half yearly, which said mortgage is dated on or about the first day of October eighteen hundred and thirty-two and payable on or about the first day of October eighteen hundred and thirty-seven, which said mortgage the party hereto of the second part hereby assumes and agrees to pay, together with the interest hereafter due or to become due thereon, and, when paid, is to be cancelled and given up to the parties of the first part together with the bonds accompanying the same.'

"And he further saith, that the officers of the company understood and he believes correctly, that the said deed was executed and delivered in fulfilment of the said contract with John Bloodgood under whose right William Bloodgood received the said conveyance ; and the officers of the company further understood, and he believes correctly, that, at

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the time of the loss, the building was not, in fact, at the risk of the said Anson Blake, but of the said William Bloodgood or John Bloodgood ; and that the claim made by the petitioner, Isaac L. Kip, was really and truly for the interest and benefit of the said William Bloodgood and John Bloodgood : the ground comprised in the said mortgage having, at all times, been more than adequate security for the mortgage held by him. He further saith that, upon being applied to for the payment of the loss, the said company directed a letter to be delivered to the said Isaac L. Kip, on the day of its date, of which the following is a copy :

‘New York, Dec. 16, 1835.

‘SIR : In relation to the claim made in your name on the Mutual Insurance Company, for loss by fire on the premises No. 4 William street mortgaged to you by Anson Blake and the policy on which you claim to hold by assignment from him, the Insurance Company beg leave to recall to your notice that, by a contract in writing bearing date the 31st day of December A. D. 1834 between Anson Blake and John Bloodgood, the premises mortgaged were sold by the former to the latter, which sale was afterwards consummated by the due execution of the deeds. Under these circumstances, the company are advised that, as between them and Mr. Blake and Mr. Bloodgood, the premises were at the risk of the latter gentleman and not under the protection of their insurance at the time of their destruction ; and that you can only claim on the ground of holding the policy as collateral to the mortgage. While they are willing to meet such claim, so far as you are in fact interested, they cannot submit to have the money applied in prejudice to them to the exoneration of the land from a charge which Mr. Bloodgood (at whose risk the property was) ought to bear. They, therefore, inform you, that they are willing to pay the amount of the loss into your hands : upon your giving them the benefit of your mortgage for their reimbursement, after the balance of the amount of your mortgage shall be paid, to be collected by the company at their own expense and risk without any act on your part to defeat or impair their rights. Or they are willing to pay you the amount of your bond and mortgage, on taking an assignment thereof by which

they will be enabled to test the claim made for the benefit of Mr. Bloodgood by proceedings with him directly. Or if you are desirous of keeping the money invested, according to the present terms of the investment, they will take such assignment and give you, in return for it, the bond of the company, payable at the same periods and with the same interest as that you hold of Mr. Blake, secured by other securities of bond and mortgage equal in value, in your own judgment, to the property now held by you as security.

Should none of these propositions be accepted, the company will be bound to conclude that your claim is put forward simply for the benefit of Mr. Bloodgood, to seek a payment to which, in his own name, he is not entitled, and will deem themselves justified in proceeding against you in chancery for the defence of what they deem their equitable rights and shall, in each case, hope to have the expenses of such proceedings charged upon you in case their rights shall be allowed by that court. Your obd't servt,

GEORGE IRELAND,

Pres't. Mutual Ins. Co.

•
'ISAAC L. KIP, Esq. Trustee, &c.'

"With the offers contained in which letter, the said Isaac L. Kip refused to comply; and which letter contains the only conditions which the said company have ever interposed to the payment of the said loss and which the receivers are advised are just and equitable conditions.

"And the said John Oothout and Robert Benson for themselves say that they believe the preceding statement of George Ireland to be true."

(Signed and sworn to.)

Mr. *G. Griffin*, for the petitioner.

Mr. *D. Lord*, for the receivers.

1st. By the contract of sale of December 31st, 1834, the buildings insured were, from the first day of February one thousand eight hundred and thirty-five and prior to the loss, at the risk of Bloodgood, the purchaser, and not of Blake

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the assured. The policy did not attach to the sale nor pass to the vendee.

2d. By the contract of sale of December the thirty-first 1834 and by the bargain and sale dated the twentieth day of January one thousand eight hundred and thirty-five, Blake was entitled in every event to call on Bloodgood and on the premises conveyed to pay off the mortgage to Kip.

3d. The transfer of the policy to Kip did not divest Blake of his right to it on payment of the mortgage nor charge his portion as assured further than to subject it to a lien for the mortgage money.

4th. Upon payment of the mortgage to Kip, Blake was entitled to the policy and to call upon Bloodgood to pay the contract price of the lands.

5th. The insurers of Blake and Kip are, upon payment of the loss, entitled to be subrogated to all the rights for reimbursement which they possessed at the time of the loss; and among these to be substituted on Blake's claim on his contracts of December 31st, 1834 and 20th January 1835 against Bloodgood.

6th. It follows that Kip was bound to admit of this substitution on being paid his loss and he can be admitted claimant only on this equitable condition.

7th. Having refused this condition he must, if he now is admitted to recover the insurance, pay costs and submit to account for the value of what could have been recovered if the substitution had been admitted on the sixteenth day of December one thousand eight hundred and thirty-five.

Jan. 16,
1843.

THE VICE-CHANCELLOR:—By the policy of insurance in question, the Mutual Insurance Company insured Blake against loss and damage by fire—he being the owner of the premises at the time of the contract.

By an assignment of the policy to Kip, the mortgagee of Blake, made with the consent of the company, it enured to the benefit of the former as collateral security for the payment of his mortgage debt. This was the only object of the assignment to Kip. In case of loss, he was to receive payment on the policy and then, as between himself and Blake, he was to apply the money towards liquidating the mort-

gage—or if Blake should, himself, pay off the mortgage, he would be entitled to a return or re-assignment of the policy from Kip and could then receive the insurance money himself.

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But to entitle Blake to the benefit of the policy in case of loss, either for the purpose of liquidating his mortgage-debt or for his own indemnification after he should have paid off that debt and entitled himself to a return of the policy, it was essential that he should remain the owner of the premises insured.

The sale of the property by Blake to Bloodgood put an end to the contract of insurance as between Blake and the company, except so far as Kip's right to it extended by way of collateral security as before mentioned. That right no act of Blake's or of the company could divest without Kip's consent. He might still claim to hold the policy for the benefit of his security, which was all that remained of the contract after Blake had parted with all his interest in the property; and if the company were obliged to pay Kip for a loss of the property insured, they, standing in the relation of sureties to him for so much of the mortgage debt, would be entitled, by subrogation, to the benefit of the mortgage for their reimbursement as sureties, after Kip should be paid in full. This would not be so if the contract of insurance still remained in force for the benefit of Blake. But it did not—his sale, as before observed, terminated it. Bloodgood, by becoming the purchaser, acquired no right to the policy of insurance or the benefit of it, unless Blake had assigned his reversionary interest in it to Bloodgood and the company had assented, thereby becoming, in effect, insurers to him. The company never contracted to insure Bloodgood as the owner and they could not be made to do so by assignment from Blake or from Kip without their consent. These views appear to me to be sustained by the principle established in the case of *The Aetna Insurance Company v. Tyler*, 16 Wend. 285 and *The Traders Insurance Company v. Robert*, 9 Wend. 404; S. C. in Error, 17 Ib. 631. Mr. Bloodgood became the owner of the premises before the loss by fire occurred, although the deed of conveyance appears not to have been actually delivered until after the fire. Still,

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he had an insurable interest as owner from the time of his contract of purchase. He however, took no measures to insure himself by virtue of the policy in question. And although this application is made confessedly on his behalf and for his benefit in the name of Kip, the mortgagee, yet he can have no better or more extensive right or equity than Kip could claim. If he was before the court on his own account claiming the dividend which the receivers are enabled to make among the creditors of this insolvent company, he would be obliged to give them an interest in the mortgage for and towards their reimbursement. The present application appearing to be prosecuted for the benefit of Bloodgood and upon a bond of indemnity to Kip for the costs, must be denied with costs to be taxed and to be paid by Bloodgood the ostensible party to it. And if Mr. Kip has any apprehension of an insufficiency of his mortgage security to pay his debt so as to deem it worth while to claim and receive a dividend upon the amount of the policy on the terms suggested, viz. admitting the receivers to take an interest in the mortgage for and towards their reimbursement out of the money to be derived from a foreclosure of the mortgage after Mr. Kip shall be paid and satisfied, he must be left to do so.

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LINDSAY v. HYATT and others.

Before the revised statutes, there was no statute expressly limiting the time to bring suits in equity. Still, a claim, arising before the revised statutes, is affected by them and will run from their passage. The court, on a demurrer which stands upon the statute of limitations, will take official notice of the date of the jurat to the bill.

On the 12th of April, 1825, a money-bond was given by an incorporated company, under their seal, payable to J. L. D. or order five months after date. It was assigned to the complainant. The association became insolvent; and the complainant now filed a bill to compel payment from directors and stockholders. On demurrer, *It was held*: that the present was not a claim of a purely equitable character; and that, in this case, the six years mentioned in the statute of limitations (R. S.) within which actions on simple contract are to be brought, applied; and not the ten years therein mentioned: as the defendants could not be sued strictly on the bond, but, if at all, only on the footing of partners or joint dealers contracting a debt.

THE complainant, Margaret Lindsay, showed by her bill, which was filed the thirty-first day of July one thousand eight hundred and forty, that about the twelfth day of April in the year one thousand eight hundred and twenty-five, a certain company, called "The United States Lombard Association," was incorporated by statute and did business in the city of New York. That the act by which it was incorporated was declared to be a public statute. That Thomas Hyatt, Samuel D. Jackson, Daniel P. Ingraham, &c. &c., (naming several persons and, among them, the defendants,) became large stockholders and directors and so represented themselves to the public, while the defendant Thomas Hyatt held himself out as president and Samuel D. Jackson as secretary of the said association. That, while such persons were stockholders and directors and on or about the first day of April in the year one thousand eight hundred and twenty-six, the said Lombard Association made, executed, delivered and issued, under their seal, their certain bond of that date, condition to pay to Jacob L. Dickenson or order, five months after date, one thousand dollars, with six per cent. interest. Also, that the value of the said bond had been received by the association. That before

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this bond fell due, she, the complainant, received the same of a broker, who the complainant believed to have been the agent of the said association and to whom she paid a valuable consideration. That, before the bond fell due, the said Lombard Association failed; and it had never been paid. That Thomas Hyatt, Samuel D. Jackson, Daniel P. Ingraham, &c. &c. (defendants) who had been such directors and stockholders, were liable and abundantly able to pay the amount of principal and interest due on the said bond: *Prayer*, for payment. The defendants respectively demurred. It will be sufficient to set forth only the demurrer interposed by the defendant Daniel P. Ingraham. He, for causes of demurrer, showed that the complainant's bill did not contain any matter of equity whereon this court could ground any decree in favor of the said complainant. And also that, by the allegations in the said bill of complaint, it appeared that the said complainant had in her possession, custody or power the said alleged bond in the said alleged bill mentioned. And that it was not averred therein that the said complainant had need of any discovery to enable her to establish the matters stated and alleged in the said bill; and, therefore, if any demand she rightfully had, which the defendant did in nowise admit, she, the said complainant, had a remedy therefor at law. And also for that it was stated and alleged in and by the said bill that the said demand or cause of action or suit in the said bill mentioned and every part thereof accrued to the said complainant more than three years next before the filing of the said bill of complaint and more than six years next before the filing thereof and more than ten years next before the filing thereof. And it was not alleged or stated in the said bill of complaint that, at the time such alleged demand or cause of action or suit in the said bill of complaint mentioned or any part thereof accrued to the said complainant as in the said bill alleged, she, the said complainant, was within the age of twenty-one years, a feme covert, insane or imprisoned; nor was it alleged or stated in the said bill of complaint that this defendant Daniel P. Ingraham was out of this state or was not an inhabitant thereof or was not usually resident within the same at the time the said

alleged demand or cause of action or suit in the said bill mentioned or any part thereof accrued to the said complainant, as alleged in the said bill of complaint or at any time within ten years next before the filing of the said bill of complaint. Nor was it alleged or stated in the said bill that the said complainant was, at the accruing unto her of the said alleged demand or cause of action or suit in the said bill mentioned or any part thereof or at any time within ten years next before the filing of the said bill of complaint, under any of the disabilities or hindered by any of the impediments to prosecution mentioned in the statutes of the state of New York existing at or since the time of the accruing of such alleged demand or cause of action or suit for the limitation of actions in that behalf; and, therefore, she, the said complainant, was not entitled to maintain her said bill of complaint or to any decree or relief thereon in this court. Wherefore, &c.

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Mr. *L. Hoyt* and Mr. *O'Connor*, for the respective defendants and in support of their demurrers.

Mr. *J. B. Scoles* and Mr. *Staples*, for the complainant.

THE VICE-CHANCELLOR :—The bill shows that the demand in question accrued to the complainant in the year one thousand eight hundred and twenty-six. The liability attempted to be enforced arose at that time. Then, there was no statute of limitations expressly applicable to the court of chancery. But, in the revised statutes, which took effect in January one thousand eight hundred and thirty, the time for commencing suits in this court was expressly limited, in cases of concurrent remedy, to the same time allowed for bringing actions in a court of law; and, in all other cases of exclusive cognizance in equity, to ten years: 1 R. S. 301, § 49 to 52. Feb. 1843.

The time which elapsed upon this demand before the passing of this statute, that is to say, from the year one thousand eight hundred and twenty-six to one thousand eight hundred and thirty, is not to be taken into the account, yet the statute began to run and attached itself to the de-

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mand, though a previously existing one, from January one thousand eight hundred and thirty, and the bill in this cause was not filed—according to the date of the jurat which the court, on demurrer, will officially notice—until the thirty-first day of July one thousand eight hundred and forty, a period of two years and six months from the time the statute began to run. If, then, this is a demand of exclusively equitable cognizance, it was barred by the statute, at least, six months before the bill was filed; and there is nothing stated in the bill to bring the case within any of the exceptions arising from disability or otherwise as provided by the statute.

But this is not a case of a purely equitable demand. The act of incorporation of the Lombard Association (Laws of 1825, p. 184, § 14,) declares that the directors and stockholders of the corporation may be sued and prosecuted for the debts of the corporation either at law or in equity in the same manner as though they were joint debtors or copartners. Here, there is a concurrent jurisdiction declared, and if there is any section of the statute which bars the remedy at law, the same is a bar in this court.

Since the opinion of Chief Justice Nelson in *Van Hook v. Whitlock*, in Error, 26 Wend. R. 43, I will not presume to say that the three years limitation applies, but it appears to me that the six years within which actions on simple contract indebtedness must be brought, does apply. The liability of the defendants arises from the terms of the act of incorporation, which puts them on the same footing as partners or joint dealers contracting a debt and as if no act incorporating them existed. The bond or sealed instrument of the corporation, which the complainant holds, is not the bond or sealed instrument of the defendants which can be declared on as such against them in an action at law. In such an action, the declaration must be in case founded on the statute, and the bond, if valid at all, may be given in evidence as proof of the indebtedness of the corporation. The form of the action and the nature of the liability to be enforced fall within the provisions of the statute which takes away the right to sue after six years.

Other objections, in support of the demurrer, are taken :

such as the entire invalidity of the bond as being unauthorized by the company's charter, its illegality in that respect, and the want of a proper assignment to the complainant. I am at a loss to perceive where the corporation got its authority for the issuing such paper and am inclined to think the complainant is bound to show it originated in a *bona fide* actual indebtedness of the company or for a consideration lawful in itself and passing between the complainant and the company. But these points of the case need not be considered, since I am of opinion the statute of limitations, upon the complainants' own showing, protects the defendants.

Demurrers allowed and bill dismissed, with costs.

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MILLER
v.
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MILLER and another v. PELLETIER and WOLCOTT.

Since the revised statutes, a contract for the sale of lands is not complete unless the seller (personally or by agent lawfully authorized) subscribes the contract. A contract, signed or subscribed by a buyer only, cannot be enforced, the statute requires the seller to sign and is silent as to the purchaser.^(a)

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1842.

Vendor
and Pur-
chaser.
Auctioneer.
Sale.

BILL of interpleader. The complainants were auctioneers ; and by direction of the agent of the defendant, Marie Theresa Pauline Pelletier, they advertised the leasehold property, No. 7, Barclay street, New York, for sale by public auction. The bill, after showing this, went on as follows : " That in pursuance of the said advertisement and on the ninth day of March, the said premises were put up for sale at public auction by your orators at the said store and sales-room of your orators ; that, thereupon, your orator Lawrence S. Forman publicly and distinctly proclaimed to the audience then present the terms and conditions of sale on which the said premises were to be sold, which terms and conditions were that ten per cent. of the purchase money should be paid down by the purchaser on the day of sale, the said ninth of March, and the balance of the said purchase money on the sixteenth day of March following, and that fifteen hundred dollars of such purchase money might remain on bond and mortgage on the said premises for the term of one year, on interest, at the rate of seven per cent. per annum. That the said premises, on such sale, were struck off to Noble K. Wolcott of the city of New York, he being the highest bidder for the same, at the sum or price of thirty-five hundred and ninety dollars, that being the highest sum bidden for the same ; that, on the same day of such sale, the said Noble K. Wolcott paid to your orators ten dollars as your orator's fee for selling the said premises, and the sum of three hundred and fifty-nine dollars on account of the said purchase, that being ten per cent. of the sum at which they were purchased by the said Noble K. Wolcott. That your orators,

(a) And see case, since decided, of *Coles v. Bowne*, 10 Paige's C. R. 526.

thereupon, made out to the said Wolcott a receipt for the said ten per cent. of purchase money and signed the same, but the said Wolcott, either accidentally or designedly, left your orator's store, without carrying away with him the said receipt. Your orators further show, that the said Noble K. Wolcott did not pay any other or further sum than is above stated to your orators on account of the said purchase, but refused to do so, alleging, on some ground taken by him, of which your orators are ignorant, that he was not obliged to complete the said purchase." The bill then went on to show a demand by Wolcott of the deposit money; and that he had commenced an action for it, while the said defendant Mrs. Pelletier insisted upon her right to it. *Prayer*, that the defendants interplead.

The defendant, Wolcott, in his answer, admitted as far as the bill went, but, denied his legal liability; and stated that a tenant of the premises had misled him as to their value. The defendant, Maria T. P. Pelletier, insisted that Wolcott ought to complete his purchase; and showed that she had tendered an assignment of the household premises so bid off at auction.

It appeared by testimony taken in the master's office, that James Cole, the clerk of the auctioneer, and who stood by his side at the time of sale, marked down the biddings. He testified: "I stood alongside Mr. Forman on the stand and put down the several biddings as they were made. The figures \$3,590, stating the amount at which the property was struck off, are in my hand-writing and were put down at the time the property was struck off. Mr. Forman sold the property. Mr. Miller was sick at that time. The property was sold at public auction fairly to the highest bidder. There were a great many bids. N. K. Wolcott was the purchaser, he being the highest bidder, and the property struck off to him. I wrote down the name of Mr. Wolcott in the sales-book as the purchaser; wrote it down as the clerk of the complainants and under the direction of Mr. Forman; wrote it down as soon as the property was struck off to him. Mr. Wolcott, when the biddings were closed and the property struck down, gave his name as purchaser, Wolcott. I asked for his first name, and he replied 'N. K. Wolcott.' The

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receipt for the ten per cent. of the purchase money, namely, three hundred and fifty-nine dollars, now produced to me, was written by Mr. Forman at the time of the sale, and handed by him to Mr. Wolcott. I saw him hand it to Mr. Wolcott, and Mr. Wolcott took it from him. I don't know what became of it afterwards; that was the last I saw of it until produced to me on this examination. Mr. Wolcott gave Mr. Forman a check on the Manhattan Bank for the amount of the deposit of ten per cent. and auction fees, amounting, altogether, to three hundred and sixty dollars; he filled up a blank check which we had in our office. The check was handed to Mr. Forman; and I afterwards took the check to the bank and received payment of it."

Mr. *Lockwood*, for the defendant Pelletier.

Mr. *C. Taylor*, for the defendant Noble K. Wolcott.

*Feb. 23,*  
 1843.

THE VICE-CHANCELLOR:—The question to be decided lies between the defendants, as to which of them is entitled to the sum of money paid into court upon the complainant's bill of interpleader? The facts are before me upon the report of the master, on a reference as between these parties. The money in question was the ten *per cent.* deposit paid by Wolcott on the sale of leasehold property by auction, the complainants having been the auctioneers, which was struck off to Wolcott as the highest bidder—he having, afterwards, refused to consummate the purchase by paying the residue of the purchase money and claimed a return of the ten per cent. The whole case turns upon the point, whether a binding contract was made between the parties?

The property was put up at auction; the terms of sale were announced; it was fairly struck down to Mr. Wolcott, the highest bidder; and, on his giving his name, the auctioneer entered it in the sales-book as the name of the purchaser, and he, thereupon, paid the ten *per cent.* required by the terms of sale.

Although there is some dispute about the fact of the terms of sale being entered in the sales-book of the auctioneer before the name of the purchaser was written there, yet I

think the evidence satisfactorily enough shows that the terms of sale were previously entered and were sufficiently full and explicit of the contract to render it binding upon the purchaser, on his name being placed there: inasmuch as the auctioneer thereby became his agent for that purpose on the property being struck down to his bid, and by his giving in his name as purchaser. I say this, however, with reference to the law as it stood anterior to the revised statutes; and as it had been declared by Chancellor Kent, in *McComb v. Wright*, 4 J. C. R. 659.

But the law, in this state, has undergone a change by the revision of 1830. It seems no longer to require any note or memorandum of the contract of sale to be signed or subscribed by the purchaser or vendee: *Baptist Church of Ithica v. Bigelow*, 16 Wend. 28; *Edwards v. The Farmers Fire Insurance and L. Co.*, 21 Ib. 493.

The language of the statute now is, that "every contract for the leasing for a longer period than one year, or for the sale of any lands or any interest in lands shall be void, unless the contract or some note or memorandum thereof, expressing the consideration, be in writing and be subscribed by the party by whom the lease or sale is to be made; and the subscribing may be by the agent of such party "lawfully authorized : " 2 R. S. 135, § 8, 9. Now, whether the legislature meant that a purchaser shall be bound, whether he subscribes a note or memorandum of the contract or does not, contrary to the intention and object of the revisors in proposing the section in the form in which it appears they originally proposed it; (*see their notes*) yet, one thing is very certain: that a contract for a sale of lands or an interest in lands beyond a lease for one year can be of no force or validity whatever, not even against the vendee or purchaser, although he may have reduced it to writing and signed or subscribed it with his own signature, unless the vendor or party making the sale also subscribed it, either by himself or his agent. The statute interposes and declares that without this, among other requisites, the contract shall be void, not merely voidable as to the party not signing or subscribing it, leaving it in force against the vendee or purchaser who has subscribed, but void *in toto* and not to be enforced at

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all. The word "subscribed" here used is to be understood in a different sense from the word "signed" in the old statute (see *Davis v. Shields*, in Error, 26 Wend. 341.) In the case in hand there is no evidence, nor is it alleged or pretended that Pelletier or any one in her behalf signed or subscribed the contract of sale in question. Her name does not appear even in the auctioneer's memorandum of sale, nor was her name written or subscribed to the terms of sale by the auctioneer or any other agent. The requirement of the statute in this respect appears to have been entirely overlooked. The contract must be deemed void as the statute declares it to be. The subsequent execution and tender of the deed by the party does not remove the difficulty. This was not making the contract of sale or the agreement for the sale to be made as contemplated by the statute, but it was the intended fulfilment of the previously made supposed contract. If the deed had been accepted, then it would have been an executed contract and all well enough; but the purchaser had a right to repose, as he did, upon the statute and to repudiate the transaction.

I must decree the money to be returned to him, with his costs to be taxed and to be paid by Pelletier.(a)

(a) The following form of decree was approved of by the Vice-Chancellor and entered: *after referring to the report of the master to whom it had been referred to take proofs*: And this cause coming now on to be heard accordingly upon the said master's report and the pleadings in this cause; and Mr. Lockwood having been heard on the part of the defendant, Maria T. P. Pelletier, and Mr. Taylor on the part of the defendant, Noble K. Wolcott; and due deliberation being thereupon had: it is ordered adjudged and decreed that the clerk of this court pay to the said defendant, Noble K. Wolcott or his solicitor the residue of the said deposit money, upon receiving a receipt therefor to be signed by him or his said solicitor. And it is further ordered, adjudged and decreed that the said defendant, Maria T. P. Pelletier, be perpetually enjoined from any proceeding against the said complainants or against the said defendant, Noble K. Wolcott, for the said sum of money, being the ten *per cent.* on the alleged sale in the bill of complaint in this cause set forth and described. And it is further ordered, adjudged and decreed that the said defendant, Maria T. P. Pelletier, pay to the defendant, Noble K. Wolcott, or his solicitor the amount of the costs of the said defendant, Noble K. Wolcott, in this suit to be taxed. And it is further ordered, adjudged and decreed that the said defendant, Maria T. P. Pelletier, do pay to the said defendant, Noble K. Wolcott, or his solicitor the sum of \$66.83, being the amount computed by the clerk of this court, to make good the deficiency of the said ten *per cent.*

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HICKS, Executor, &c. v. COCHRAN and others, Executors, &c.

Parties were recognized by the court as man and wife, although no marriage ceremony had taken place, from their having cohabited together for years and being considered as such by their acquaintances, and also from having both executed a deed in which the woman was described as wife. (a)

Although the effect of a deed of real estate to husband and wife is to let the entirety go to the survivor, yet it may, by express words, create a tenancy in common and that too in unequal estates, as, one to take a moiety for life and the other in fee.

Husband and wife make a deed to a party who reconveys it, "the one equal half part to each;" but it was coupled with conditions: for instance, that while the wife was to take the rents for life, she had not "power to sell or incumber her half, and could dispose of it only by will; and the husband was, also, only to do so as to his moiety, save by her consent. The wife died first, having made a will; but the husband assumed the ownership of the whole and devised it to his second wife and to his son by her: *Held*, that the restrictions grafted on the fee were not void, that the husband had bound himself thereby and so relinquished his right to the wife's moiety; and also, that the will made by her would be looked upon in the nature of a valid appointment which her heir could not set aside and in relation to which the second wife and the son had, certainly, no right or claim.

In the year one thousand eight hundred and one, Henry Pritchard and Mariana, his reputed wife, emigrated from England and settled in the city of New York. It appeared that they had lived together in England as man and wife.

July 21,
1842.

Husband
and wife.
Deed.

In the month of April, one thousand eight hundred and fifteen, an act was passed by the legislature of the State of New York, authorizing these parties respectively to take real estate to the amount of twenty thousand dollars in the state, either by descent or purchase; and to hold or dispose of the same in the same manner as natural born citizens.

In the month of May, one thousand eight hundred and fifteen, Mariana bought of Kinlock Stewart and Agnes his wife, the dwelling house and lot known as No. 157 Greenwich-street, New York, for four thousand nine hundred and

deposit money paid into court, and that the said Noble K. Wolcott have execution for the said sum of \$96.83, and for his said costs.

(a) And see *Donnelly v. Donnelly*, 8 B. Mon. 113.

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fifty dollars ; but, in August of the next year, she and the said Henry Pritchard, for a nominal consideration, reconveyed the premises to Kinlock Stewart by a deed in which she is described as "the wife" of the said Henry Pritchard.

On the fourteenth day of September, in the year one thousand eight hundred and sixteen, the said Kinlock Stewart and wife, by deed of that date, in consideration of ten dollars and of love and affection, conveyed to the said Henry Pritchard and Mariana Pritchard "and to their heirs and assigns (in their actual possession then being) the one equal undivided half part of each of all that certain" messuage 157 Greenwich-street aforesaid. *Habendum*, to them in fee ; on the following conditions: 1st. That the said Mariana Pritchard should have the government and should receive all the rents, issues and profits of the said premises during her natural life. 2d. That she should not, during any time of the term, sell or convey her half of the said premises or mortgage or in any way incumber them without the consent of the said Henry being first had and obtained. 3d. That she should have sole right and power to will her half to whomsoever she might think proper. 4th. That Henry should not sell or incumber his half without her consent. 5th. That he might will away his half to whom he pleased. 6th. If one of them died intestate, the whole was to go to the survivor, his or her heirs and assigns. 7th. Either dying leaving a will, the executor or executors should not act thereupon, but the rents, issues and profits of the premises and the estate thereby granted should enure to the benefit, advantage and disposal of the survivor, his or her representatives ; and in the event of the death of such survivor and only then, their and each of their executors should dispose of the said estate according to their and each of their intentions expressed in their several wills.

In the year one thousand eight hundred and twenty, the said Henry and Mariana separated ; and Mariana alone continued thenceforth to occupy the house until her death.

Sometime in the year one thousand eight hundred and twenty-seven, Mariana died without issue, having previously made an instrument in the nature of a will, by which

after giving certain legacies, she devised all the residue and remainder of her estate and effects real and personal unto Henrietta Isabella Stewart and Isabella Catharine Stewart, daughters of William Stewart, then residing in or near London, in the kingdom of Great Britain. At the time of her death she had no relations other than aliens—nor was there any real estate in which she could have any right or seeming claim than the said house in Greenwich-street.

Immediately after her death, Henry Pritchard took possession of the house and occupied it until the year one thousand eight hundred and thirty-four, when he died, leaving a widow and a child. He also had made a will, wherein he devised the premises to executors in trust for his son.

The executors of Henry Pritchard denied the right of Mariana to affect the premises by any will; while her executor filed a bill to establish such will and to have its provisions executed. The persons made defendants were the widow and son of Henry and also Henrietta Isabella Stewart and Isabella Catharine Stewart.

The case came before the court on bill and answer.

Mr. *Cutting*, for the complainant.

Mr. *J. O. Sergeant* and Mr. *Lockwood*, for the defendants.

THE VICE-CHANCELLOR:—Henry Pritchard and Mariana Pritchard, whose transactions have given rise to the bill in this cause and who are represented, the latter by the complainant as her executor and the former by the defendants as his executors, are, I think, to be regarded in the light of husband and wife for all the purposes of this suit. Although a marriage ceremony may never have taken place, yet, having lived and cohabited together as man and wife both in England and in this country for twenty years, having publicly represented themselves to be such—been so considered and acknowledged by their acquaintances—she bearing his name, being called his wife in a deed which they both executed and in all their dealings with each other

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in respect to the property in question recognizing the relation of husband and wife as subsisting between them as appears to be conceded by both the bill and the answer in this cause, they are to be regarded as having that relation to each other in respect to the property as much so as if an actual marriage ceremony was proved: *Jenkins v. Bisbee*, 1 Edwards's Ch. Rep. 377; *Fenton v. Reed*, 4 J. R. 52; *Jackson v. Clair*, 18 Ib. 346.

I shall, therefore, proceed to consider this case upon the assumption of the parties being husband and wife when the transactions took place. The principal question is as to the effect of the deed of reconveyance from Kinlock Stewart and wife to the Pritchards of the fourteenth day of April, one thousand eight hundred and sixteen. The property had been previously purchased by and in the name of Mariana Pritchard; and the deed was made out to her alone. In order to carry into effect a new arrangement concerning the property, the legal title was put back again in Stewart; and the deed in question was then executed by him and his wife to both.

At law, a conveyance or devise of lands to husband and wife jointly creates an estate in them of the entirety as one person—being but one person in law, they do not take in moieties as joint tenants nor as tenants in common—one cannot sell the whole or any part without the concurrence of the other and, upon the death of one, the whole vests in the survivor, in which respect it partakes of the nature of a joint tenancy: 2 Kent's Com. 132; 4 Ib. 362. It is laid down, however, as a well understood rule of law, that a husband and wife may, by express words, be made tenants in common by a gift or conveyance to them during coverture: 2 Preston on Abst. tit. 41; and from another work of high authority, it is very manifest that a gift or grant to a husband and wife is to have just such effect in respect to the estate which they take as was intended to be created. Thus, the wife may take only an estate for life and the husband an estate tail or in fee—and *vice versa*: Shepard's Touch. 112, Preston's edit. I have no hesitation about adopting and following this rule, especially in a court of equity where the intention of the parties in any deed or

instrument, not contrary to law, should be allowed to prevail.

What, then, does the deed in question purport to convey or settle upon this husband and wife?

In terms, it purports to convey the property in distinct moieties, the one equal half part to each. *Habendum* "the said equal undivided half part" unto the said parties of the second part their heirs and assigns for ever. These are very explicit words and as strongly expressive of a tenancy in common, in equal moieties, as if the words, *to hold as tenants in common*, had been used. Then follows the proviso or condition that the wife shall have the government and receive all the rents of the premises during life, but shall not sell or in any manner incumber her half of the premises without consent of her husband, with full right and power nevertheless to will her half to whomsoever she may think proper; so, the husband is not to sell or incumber his half during his life without her consent, but may will the same to whom he pleases. In the event of either dying intestate, the whole to belong to the survivor. And lastly, in the event of the death of either leaving a will, the executors are not to act, but the rents are to go to the survivor; and it is only at the death of the survivor that the executors are to dispose of the property according to the intentions of the parties as it may be expressed in their several wills. The wife died first, leaving a will and having appointed the complainant in this cause executor thereof, with power to sell her half of the property, the proceeds of which are bequeathed to relatives. The husband afterwards died, leaving a will and appointing the defendants the executors thereof, with power to sell the whole premises, &c. Now, it is insisted, on the authority of *Goodhill v. Brigham*, 1 Bos. & P. 192, that all this proviso and condition in the deed and the power to dispose of the property by will is void, as being inconsistent with the fee which was given to her by the same deed; that no modification or power grafted on the fee can be of any avail, for it is immediately merged in the fee. But, in *Roper (Husband and Wife*, 2 vol. 105,) it is shown that the weight of authority is the other way; and that the power and the fee may

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well subsist together without being merged. He, therefore says, if an estate be given to a married woman in fee, with a power annexed to or preceding such limitation to dispose of the fee as a *feme sole*, such power will be valid; and, upon the execution of it, the fee which, till appointment, vested in her, would be divested. In Thomas and Fraser's notes to *Sir Edward Cleve's Case*, 6 Coke, 17, a., there is a complete summary of the law in these words: "It has been doubted whether a power and a fee may subsist distinctly in the same person without the power merging in the fee. Sir Edward Cleve's case has always been cited as an authority to show that they may. It is now settled accordingly that the fee vests until the execution of the power and when the power is executed it is the limitation of the use under and by effect of the instrument by which the power was reserved"—referring to *Maundrell v. Maundrell*, 10 Ves. 253; *Ray v. Pung*, 5 Mad. R. 310, and 5 Barn. & Ald. 561, as settling this doctrine.

Again—so far as this is a question between the representatives of the wife and the representatives of the husband under their several and respective wills, I think it is very clear that the latter can have no rightful claim on the wife's separate and distinct moiety of the estate as I have shown it to have been. By the arrangement which was entered into and agreed upon between them and which it is very certain was intended to be carried into effect and consummated by putting the title back in Kinlock Stewart and then accepting from him a fresh conveyance in the manner and upon the terms specified in the last deed, the husband became bound to abide by the terms and conditions of it. He must be deemed to have relinquished thereby all right to one moiety of the property; and to have become content to take the other with the power of disposal or appointment by his will. It was competent for him to enter into such an agreement with his wife and there was sufficient inducement and consideration to make it binding and obligatory on him and his heirs, devisees or appointees. But the great difficulty in a legal point of view is, how to consider the wife bound by an agreement which she enters into with her husband *after* the marriage and while under the legal

disability of coverture, by which she can take to herself a power to dispose of her real estate by will or appointment, executed during coverture, so as to break the descent and deprive her heir of it. When the legal title and estate is vested in a trustee, subject to her appointment, no such difficulty can arise ; and so too when the power is reserved or secured to her by agreement *before* marriage. This, however, is a matter with which the husband's representatives can have no concern. He has parted with all his control over and right to the wife's estate. On this subject I refer to Atherley, 336, 339 ; 2 Roper's Husband and Wife, 181.

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Then, how does the case stand with regard to the right of the present complainant as executor of the wife, to proceed and have a sale of her moiety of the property as directed by her will ? If he can give a good title to a purchaser or if the court can decree such a title as against the wife's heir, then, all difficulty in this case is at an end. If this was property which belonged to the wife before marriage and concerning which she had made the agreement or arrangement in question with her husband after their marriage, then, both upon principle and authority, the power which she has undertaken to exercise by her will would be invalid and her heir would be entitled. But this is property which came to the wife during the coverture by deed, containing conditions and a power which, as already shown, are not altogether nugatory. I think, for the purposes of this suit, the property may well be considered as coming to the wife *ab initio* by this last deed. With respect to the real estate which accrues to the wife during marriage by deed or will, if no trustees be interposed and the instrument expresses that the lands shall be to her separate use and that she shall have power to dispose of them, although she thereby takes the legal fee, she may nevertheless appoint it, so that such appointment will bind her heir and convert him into a trustee for the appointee. This Mr. Roper lays down as the rule in such cases, notwithstanding *Goodhill v. Brigham*, 2 Roper, 183, 184 ; and in this case I fully concur.

It is manifest, however, that a perfect decree for sale and
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conveyance of an effectual title to a purchaser cannot be made without bringing in the heir; and as it appears the wife left no heirs capable of inheriting, they being aliens, the Attorney General must be made a party before an effectual decree can be pronounced.

Order that the cause stand over for that purpose.

TOOKER v. SLOSSON and another.

A defendant who denies all interest in property, cannot be compelled to answer as to its after-value or contents. Thus, where a judgment-creditor charged fraud and that the defendant had an interest in a stock in trade and alleged its value, and the defendant showed he had no interest in it after a certain day and which was prior to filing the bill: *Held*, that he need not answer as to its value or as to the contents.

Sept. 15,
1842.

*Pleading.
Answer.
Exceptions.
Judgment
Creditor.*

ON exceptions to the master's report, allowing exceptions to the answer of the defendant William H. Slosson.

The judgment was obtained against the said defendant William H. Slosson; and the other defendant Henry Slosson was made a party on the allegation that a fraudulent transfer or sale had been made to him by the former.

The bill charged that the judgment debtor was a partner with one Ferguson in the grocery business; and an exception was taken, because this defendant had not answered the following allegation: "that there is a large and valuable stock of goods in said store" (of Ferguson & Slosson) "of the value of several thousand dollars; and that the same belongs to the said Alanson Ferguson and William H. Slosson as copartners; and that the said Ferguson & Slosson are not indebted, but for a small portion of said stock, the same having been nearly all paid for; and that the interest of the said Slosson therein, after payment of all the copartnership debts, will amount to considerably more than the amount of the claim of your orator against the said William

H. Slosson." Second exception : For that he had not answered &c., "that the said defendant and his copartner Alanson Ferguson purchased, for the said joint business, large quantities of groceries from different individuals, wholesale dealers in the city of New York and that said purchases were made for and on the credit given to the said William H. Slosson and Alanson Ferguson, they comprising the firm of Ferguson & Slosson."

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The parts of the answer of the defendant William H. Slosson, bearing upon these allegations (contained in folios 16, 18, 19 of such answer) showed that he was not a copartner in the said concern of Ferguson & Slosson, nor had he been a copartner since the twenty-fourth day of November one thousand eight hundred and forty-one (which was prior to the filing of the bill); that he was a copartner up to that day, when this defendant executed such assignment as aforesaid to Henry Slosson; and that from and after that time such copartnership between this defendant and the said Ferguson ceased and from such time the defendant had no interest in the said concern of Ferguson & Slosson, otherwise than as a clerk for the said Henry Slosson; and that, from and after such day, whatever groceries were purchased for such concern, were bought altogether by Alanson Ferguson and not by this defendant; and to whom the credit was given by the different individuals, wholesale grocers in the city of New York, from whom said groceries were purchased, this defendant could not, from his own knowledge or information say; but this defendant denied that the said groceries were purchased for this defendant and the said Ferguson; and that if any such groceries were purchased, the same were purchased for the said Alanson Ferguson and Henry Slosson, composing the firm of Ferguson & Slosson from and after the said twenty-fourth day of November one thousand eight hundred and forty-one.

Mr. *D. Egan*, for the complainant.

Mr. *A. Hastings*, for the defendant William H. Slosson.

THE VICE CHANCELLOR :—The defendant has answered

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so fully in relation to the dissolution of his partnership with Ferguson on the twenty-fourth day of November one thousand eight hundred and forty-one and has so positively denied throughout his answer that he had any interest in the business as a partner after such period that I do not see the propriety of allowing the first and second exceptions. It seems to me that all that is material about these two exceptions are answered in the twelfth and thirteenth and in the 16th, 18th and 19th folios of the answer. If, according to the denials, the defendant had no interest in the partnership property or business after the twenty-fourth day of November, then it is not material to know what the value of the property in the store was in the month of March one thousand eight hundred and forty-two when this bill was filed or the quantities of goods purchased by the continuing firm. He says the purchases were made altogether by Ferguson and not by him, nor on his credit but for Ferguson and William Slosson who composed the firm after the twenty-fourth day of November one thousand eight hundred and forty-one. If the defendant should be required to answer further he could but add to what he has already said, in order to be consistent, that which would be immaterial to the complainant to know.

Order, that the exceptions to the master's report be allowed, with costs to be taxed.

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CURTIS and another v. ENGLE and another.

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The court will not, on petition, compel a solicitor to pay an examiner's bill, but leave the latter to his remedy at law.

MR. EXAMINER LANSING presented a petition for an order on Mr. Cook, the defendants' solicitor, to pay his fees for testimony taken in the cause.

Oct. 3,
1842.

Examiner.
Fees.

THE VICE-CHANCELLOR held : That the Examiner must be left to his remedy by action at law for his fees.

Petition denied—each party to bear his own costs.

THE AMERICAN BIBLE SOCIETY and another v. HAGUE,
Surviving Executor, &c.

On the point of a plea of another suit pending, the court looks to see whether the bills are substantially for the same cause and for the like object. On the dismissal, at a proper stage of the first bill, the court will allow the second to stand.

EXCEPTION to a master's report on a plea of another cause pending. The master found that the former bill was "for the same matter."

Oct. 17,
1842.

Pleading.
Practice.
Plea of
another
cause
pending.

Mr. Rutherford, in support of the exception.

Mr. John L. Mason, for the defendant.

THE VICE-CHANCELLOR :—The reference under the 48th rule, to ascertain the truth of a plea of a former decree or of another suit pending for the same cause, involves a mere matter of fact. I am satisfied, after looking into the present

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bill and the former one pleaded, that they are substantially for the same cause and for the like object. I consider that the master has decided correctly; and his report must be confirmed. What effect is to be given to the plea is another question, which will be determined when the plea shall be set down for argument or when the matter of it shall be brought before the court in some other form—if any other course shall be advised besides arguing the plea.

If the present complainant takes measures to have the former bill dismissed for want of prosecution or because of the impracticability, from the number and uncertainty of parties, of ever bringing it to a hearing so as to make a proper and binding decree on it, then the court may still allow the present bill to remain, so as, at least, to give the complainants the benefit of what they claim as devisees of one third of the residuary estate: *Mitford*, 167, 248; *Crofts v. Wortley*, 1 Ch. Cases, 241; *Story's Eq. Pl.* 94.

The exceptions to the master's report must be overruled, with costs, and the complainants must be left to take such other course as they may be advised touching the former suit and its further prosecution.

1842.

BYAM
v.
STEVENS.

BYAM and others v. STEVENS and LACOUR.

An injunction should not refer the defendant to the bill for any of the matter enjoined. This, however, would not excuse an infringement, if a defendant had knowledge *dehors* the injunction.

Where there may have been but a constructive infringement of an injunction and the nature of the suit is such as to make it difficult to calculate damages, the court will refuse an attachment and leave the chance of injury to be embraced in the decree.

Where the defendants are aliens and proceed to remove the cause into the circuit court of the U. S. under the act of congress, the granting an injunction on motion for its infringement will not be ground for keeping a cause in this court.

THE complainants, Ezekiel Byam, Prentiss Whitney and Seth King, were trustees for an association of persons entitled the American Patent Friction Match Company. An action had been heretofore commenced against the defendant John H. Stevens, who was the owner of certain patents for the making, &c. of matches by certain machinery. An agreement under date of the twelfth day of July one thousand eight hundred and forty-one was made between the complainants and the said Stephens, whereby he was to work his machinery in Stanton street, New York, and make matches exclusively for them. Their bill now alleged that he was making matches, by this machinery, and disposing of them in fraud of the agreement; and the complainants charged that the other defendant, Michael Lacour, was used by him for that purpose. An injunction was granted restraining the said John H. Stevens and Michael Lacour "from using or causing or permitting to be used by others certain machinery specified in an agreement made between the said complainants and the said John H. Stevens bearing date the twelfth day of July A. D. 1841, and which is set forth in the bill of complaint for the manufacture of matches and also from using the process described in any of the letters patent also specified in the said agreement. And also from selling any matches already manufactured by the use of the machinery and process aforesaid or either of them."

A petition was now presented, on the ground of the alien-

Nov. 10,
1842.

Practice.
Injunction.
Attachment.
Alien.
Removing
cause.

1842.

BYAM
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ism of the defendants and amount involved, to remove the cause into the circuit court of the United States for the southern district of New York. And also, motion against the defendant Lacour for an alleged infringement of the injunction. The notice of application to remove was shortly prior to the service of application for an injunction.

The defendant Lacour, in meeting the matter of the attachment, deposed (*inter alia*) as follows: "And this deponent further says that he does not know what machinery is specified in an agreement made between the complainants and the said John H. Stephens bearing date the twelfth day of July one thousand eight hundred and forty-one or that any machinery is therein specified. That this deponent is not a party to said agreement and never read the same and does not know the contents thereof even from hearsay, so far as to know what machinery is specified therein, but if the machinery therein specified is that used by the said Stevens before the date of the said agreement, as he believes it must be if any is specified, it is not the machinery used by this deponent. And this deponent further says, that there is a steam engine, some shaftings, lathes and benches and tools which were there when the said Stevens was there, but he has not supposed that these are comprehended under what the complainants term machinery for the manufacture of matches, being articles in general use by all mechanics whose trade requires the use of such implements or tools. And this deponent further says, that he does not know and has not been informed what letters patent are specified in the agreement mentioned in the said injunction, nor what proceeds or what varieties of process are required in letters patent specified in the said agreement."

Mr. Dana and Mr. B. F. Butler, for the complainants. They claimed that the present application for an attachment was in the character of a criminal proceeding and that it was not a matter of course for the court to allow the removal of the cause and referred to *Cobbett's case*, 3 Dallas, 467; *Rogers v. Rogers*, 1 Paige's C. R. 185. Also they urged that such removal would leave the complainants remediless

as to the alleged contempt. The issuing of an injunction should also be remembered.

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Mr. *George C. Goddard* and Mr. *Cutting*, for the defendants.

The case of *Rogers v. Rogers* was decided on the ground that the suit sought to be removed by the defendant was merely an equitable defence to certain suits at law brought by the defendant against the plaintiff in the state courts, to stay proceedings in those suits and therefore to be considered an original bill. In the case cited from 3 Dallas, 367, *Respublica v. Cobbett*, a removal was denied, 1st, because the supreme and not the circuit court had jurisdiction where a state was a party; and 2d, it was an action on a recognizance which was held to be of a criminal nature and, therefore, not within the act. The case of *Jackson v. Stiles*, 4 J. R. 493, and all the cases recognize that the removal is a matter of right when the case is within the act. The act of congress (act of 1789, chap. 20, § 12, p. 57, Story's Edit., is founded on the Constitution of the United States. It secures to aliens the right to be heard in the federal courts. That an injunction has been granted is no reason against allowing the motion. The act of congress has no such exception. Even if the United States Court could not grant an injunction, it would be the mere misfortune of the party and would not prevent the removal. But the United States Court can grant one. The motion for attachment is against one only and ought not to have any effect against the other defendant.

THE VICE-CHANCELLOR :—The injunction restrains the defendant threefold : 1. From using certain machinery specified in an agreement between the complainant and Stevens of the twelfth day of July one thousand eight hundred and forty-one and which is set forth in the bill for the manufacture of matches. 2. From using the process described in any of the letters patent also specified in the agreement. 3. From selling any matches already manufactured by the use of the machinery and process or either of them.

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This does not restrain the defendants from making and selling matches generally. They are still at liberty to make and sell matches—only they must not make matches by means of the machinery and process referred to or sell such as had thus been made.

The injunction is defective in not showing upon its face the particular machinery and processes which it is intended to restrain the defendant from using, instead of referring them to the bill and the agreement and letters patent therein mentioned: *Sullivan v. Judah*, 4 Paige's C. R. 446. Still, if the defendants knew all these particulars *dehors* the face of the injunction, they are chargeable with the consequences of violating it: *Ib.* This defendant Lacour swears he did not know the contents of the agreement of the twelfth day of July one thousand eight hundred and forty-one, he not being a party thereto so far as to know what machinery was specified therein, and that he neither knows nor has he been informed what letters patent are specified in the agreement mentioned in the injunction, nor what process or varieties of process are described in letters patent specified in the said agreement. He states, moreover, that the machinery used by him is very different from that used by Stevens and is not the same machinery nor has he used or caused to be used the machinery used by Stevens since the injunction was served on him. In the face of these denials and considering also the other responsive matters contained in the affidavits and the fact likewise that the defendant is at liberty to manufacture matches by the use of other machinery and process than that enjoined, I consider that the most discreet course is, to refuse the attachment and to leave the complainants to pursue their remedy by a supplemental bill against Lacour for an account of these subsequent operations of his in manufacturing and selling matches, if the complainants can substantiate their claim to an exclusive right to the business carried on at this manufacturing place in Stanton street under the agreement with Stevens.

If there has been a violation of the injunction by Lacour, it would seem to be rather a constructive violation than otherwise and instead of investigating the matter in a collateral proceeding by attachment when it will be very diffi-

cult to know in anticipation of a decree determining the rights of the parties, what compensation should be awarded to the complainants, I am of opinion it had better be left to the matter of accounting under a decretal order that may be made after a hearing on the merits.

The defendant John H. Stevens is entitled to have the case removed, at once, to the circuit court of the United States. And when it is in that court as to both defendants, the complainants can file a supplemental bill, showing this continuation of the business by Lacour, calling him to an account for it and praying a further and more particular or specific injunction out of that court.

Motion for attachment denied, and costs to abide the event of the suit.

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BARCLAY and others v. TALMAN *et al.*(a)

A court of chancery can interfere to protect and enforce the trusts of an assignment made by a company incorporated in another state while the person or property to be acted upon is within the jurisdiction.

And this might be done at the instance of a creditor provided for in the assignment or by shareholders where they are to have an express benefit under it.

Where an incorporated company makes an assignment for creditors and no event has occurred giving shareholders any express benefit under it and its charter has not become surrendered, revoked or invalid, the shareholders cannot file a bill (which recognizes the assignment) to restrain the assignee in relation to the properties assigned. A voluntary assignment by a corporation or its insolvency or the non-user or misuser of its charter may lay the foundation for a direct application to vacate it; but, until the proper public officer of the state creating the corporation acts and a judgment or decree of a proper tribunal is had, the corporation remains for all the purposes of its creation and with all the legal capacity it ever possessed. *Held*, therefore, that where an incorporated company of Maryland had assets in New York and made an assignment in Maryland, in which one of the trustees under it resided within the jurisdiction of this court, the shareholders could not file a bill, while the charter was outstanding, which

(a) 15th August, 1843, affirmed by the Chancellor on appeal.

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and 28,
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*Corporation.
Incorporated
Company.
Insolvent
Company.
Rights of
Shareholders in
Equity.
Charter.
Foreign
Corporation.
Injunction.
Jurisdiction.
Assignment by
insolvent.*

recognized the trust and yet asked the court to restrain the trustees on the grounds that there was mere virtual dissolution and that the assets had become an equitable trust fund. The shareholders should first proceed in Maryland to dissolve the corporation.

THIS case came before the court on an order to show cause why an injunction should not issue and a receiver be appointed. Besides the circumstances detailed in the bill, there were a few additional facts presented by the affidavits of the defendants.

The complainants were a portion of the stockholders of the American Life Insurance and Trust Company; and they exhibited their bill on behalf of themselves and of all the other stockholders—and it was expressed to be “also on behalf of all those who were creditors of the company,” a corporation created by an act of the legislature of the state of Maryland passed in December, 1837, constituting its charter, which was declared to be a perpetual one, with a capital of two millions of dollars. The company commenced business at Baltimore in the state of Maryland; but in the year one thousand eight hundred and thirty-eight they transferred the principal part of their business to the city of New York, where it had been since conducted on a large scale—embracing transactions to the amount of some eight millions of dollars.

On the sixth day of July, one thousand eight hundred and forty-two, the company, finding itself embarrassed, made a voluntary assignment of all its property and effects to the defendants Patrick Maccullay and George F. Talman, upon trust for the benefit of creditors; and, in a certain event, for the advantage of the stockholders. The deed of assignment was executed at Baltimore, in pursuance of a resolution of the board of managers or trustees regularly convened there. The assignees were selected without consulting the stockholders or creditors. The largest portion of the assigned property being in the city of New York, it was delivered to or taken possession of by the defendant George F. Talman, the only acting assignee in New York. Anthony Barclay, Esquire, had been named a trustee, but he declined the trust. The other assignee, Patrick Maccullay, resided in Baltimore.

The object of the present suit was, to have the court of

chancery protect the property, by placing it in other and safer hands; and decree a final distribution of it amongst the lawful creditors and stockholders. The *gravamen* of the bill may be stated as follows: 1. A course of business pursued by the company, including many very heavy transactions, which were not only unauthorized by their charter, but were contrary thereto and contrary also to the restraining law of the state of New York and in respect to which the officers and managers of the company had committed breach of duty towards the stockholders and brought its affairs into embarrassment and subjected the stockholders to great loss. 2. Contracting usurious debts and creating liabilities not authorized by their charter and which could never be legally enforced; making various partial assignments or hypothecations of property and, finally, a general assignment of the estate of the company, to be held in trust for the security and payment of such illegal as well as fair and honest demands and giving preferences. 3. Selecting, as assignees under the assignment, the president of the company for one, who was largely indebted to such company and who had been an officer thereof, during the whole period of the illegal transactions complained of and for appointing, as another assignee, one of the trustees or managers of the company, who, it appeared, had previously assigned and who had not been a trustee or manager within a year previous to the making of the assignment. The bill, moreover, insisted that the company, on parting with all its property by means of the assignment, ceased to have any legal existence; that the property had thereby become a trust-fund liable to be applied in equity to the satisfaction of legal demands of creditors and the surplus to the stockholders; that the charter had become extinct and the same consequences must follow as though it had been limited and had expired by its own limitation; that, if the facts did not in law amount to a technical dissolution of the corporation, yet they showed such an entire surrender and abandonment by the officers and trustees of the company of all its property and effects that, in equity, the complainants had a right to ask the aid and interposition of this court in securing the pro-

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perty and applying it to the benefit of all persons interested therein.

Mr. D. Selden and Mr. Wood, for the complainants.

Mr. B. F. Butler and Mr. George Griffin, for the defendants.

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THE VICE-CHANCELLOR :—It is to be observed that the bill nowhere asks to have the assignment set aside, and the counsel for the complainant, on the argument, disclaimed all intention of impeaching its validity or of disturbing the trusts therein declared—on the contrary, they profess a willingness to have those trusts executed, with such modifications as a court of equity would naturally adopt in order to carry out the intendments of law and do complete justice to all parties—stockholders, as well as creditors.

There can be no doubt of the power of a court of chancery here or elsewhere to interfere for the purpose of protecting and enforcing the due performance of all or any one of the specified trusts of the assignment in question, so long as the person and property to be acted upon or either of them are situated within the territorial limits of such court or the bounds of its jurisdiction.

Thus, for example, if creditors, whose debts are provided for by the assignment or any of them, should file a bill in this court, complaining of some misconduct of the assignees or of the insecurity of the property in their hands or of waste or misappropriation of any of the funds; and asking to have the property protected and the trust executed, this court would certainly have jurisdiction to entertain such a bill in relation to the trust property or against the person here within the reach of its process.

So, again, if there is in this assignment a present subsisting trust expressly declared for the benefit of the stockholders of the company, they may, under similar circumstances, file a bill; and the jurisdiction of this court, in relation to the subject-matter here, could not be questioned.

But the great point to be considered is, whether, independent of the express trusts in the assignment, the court of

chancery of this state can take cognizance of the case in behalf of stockholders?

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Let us see what the trusts are which immediately concern the stockholders. They are to be found, if any where, in the eleventh and twelfth clauses of the assignment. By the eleventh clause, it is provided that, whenever the debts of the company shall have been paid out of the assigned property or, before that is done, whenever it shall be required by a majority in amount of the unpaid creditors and by the stockholders at a stated meeting to be called for that purpose (the chancellor of Maryland assenting to the requirement,) then, in either of the above two events, the assignees shall reconvey and deliver to the company all the property which may remain : and the company shall thenceforth possess and enjoy the property so reconveyed as fully as if the assignment had never been executed. Now, here is not a trust for stockholders, except as they compose the body corporate. In either of the events provided for, there is not to be a distribution among them, but a restoration of the property to the company in its corporate capacity. The trust supposes the corporation still to exist and its capacity unimpaired to take and hold the property upon a reconveyance ; and, if any proceedings at law or in equity against the assignees should be necessary in order to compel an account and a due performance of this trust, such proceedings must be taken by and in the name of the corporation and not by individual stockholders. The twelfth clause, however, does create a trust for the benefit of stockholders individually, namely, in the event that the charter should be vacated, for then the surplus or remaining property, after payment of the debts, is to be distributed by the assignees among the stockholders. This is an event looked forward to as one which might happen and not as one having already occurred. It is prospective and contingent. The language is : " And should it so happen that, before or after payment of all the debts, the charter of the company shall be vacated, then and in that event the said assignees shall make distribution among the stockholders, &c." This seems to suppose that proceedings might be taken to annul the charter and dissolve the corporation by judicial sentence or

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possibly to repeal it by legislative enactment and in either case it was proper to provide for the entire settlement and winding up of the concerns of the company with the stockholders, as well as with the creditors and have a trust for a final distribution. But before the stockholders can avail themselves of this trust according to its plain and obvious meaning, they must show that the event has occurred upon which it is made to depend and from which it is to take effect. This is not shown. The fact of any such judicial sentence or decree or repeal by or surrender to the granting power nowhere appears. That there has been a virtual abandonment and surrender of the corporate powers of the company and that it has ceased to exist or become extinct is alleged as matter of law from the facts stated ; and if correct, as a legal consequence, it is not that act revoking or vacating the charter which the twelfth clause has reference to and which is to give effect to the trust for distribution.

It seems to me quite clear that, upon the trusts of the assignment, the stockholders, at present, can have no standing in court.

Then, aside from these trusts, is there enough in this case to give this court jurisdiction at the instance of stockholders.

They claim the right to have the property of this foreign corporation, which is situated within the city and state of New York, placed under the protection of this court ; and applied and distributed in the same manner as upon a distribution and a winding up and final settlement of the concerns of the corporation. This, in effect, is the scope and object of the bill. It proceeds, as already shown, upon the ground of a virtual dissolution of the corporation ; and that its property has become, in equity, a trust fund liable to be dealt with in this way.

But, is the corporation dissolved, so as to expose itself and its property to this consequence ?

The counsel for the complainants place great reliance on the cases of *Slee v. Bloom*, 19 J. R. 473, and *Penniman v. Briggs*, Hopk. R. 300, and S. C. on appeal, 8 Cowen's R. 387 as establishing the point.

These cases do, indeed, decide that manufacturing corpo-

rations formed under a general statute of this state and which were but a species of partnership—were to be deemed dissolved within the meaning of the statute, whenever they ceased to do business and were divested of all their property either by their own act or by executions at law against them. But these decisions were made with reference to the rights of creditors in commencing suits against stockholders for the debts of the corporation, the statute having imposed upon the stockholders, to the extent of their shares, a personal liability for whatever debts were owing by such corporations at the time of their dissolution. Having ceased to act as a company and being without the means of ever resuscitating or resuming business, they were held to be dissolved within the intent of the statute so far as to give the remedy to creditors against the individual stockholders and that a judgment of ouster or dissolution was not necessary previously to the commencement of a suit by creditors under the statute.

These cases, however, are not authority for the position assumed by the bill that a voluntary assignment by a corporation of all its property, for specific purposes, is *ipso facto* a dissolution as between the stockholders or corporators.

Such an act may lay the foundation for a proceeding to vacate the charter and dissolve the corporation. Insolvency may be a sufficient cause for a similar proceeding at the instance of stockholders or creditors. So, non-user and misuser of the corporate powers may be cause of forfeiture when the government, by its proper officer, will proceed to recall the charter or grant of its franchises. This can only be accomplished in any of the supposed cases by a direct proceeding taken against the corporation itself in its corporate name; and until judgment or decree of a competent tribunal ousting it of its corporate rights and pronouncing it dissolved, the corporation remains for all the legitimate purposes of its creation.

This is not only a part of the common law as handed down to us from former times, but it is now incorporated into the revised statutes of this state which confer jurisdiction upon the court of chancery and prescribe the proceedings which may be had against corporations in certain cases : 2

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R. S. 462, 467, and which declare the remedy also by information in the nature of a *quo warranto* before the Supreme Court: Ib. 561, § 39. And it is the law which has been followed in other states; and nowhere is it more fully recognized and applied than by the highest judicial tribunal of Maryland: See the cases in 4 Gill & Johns. R. 1; 6 Ib. 205; 9 Ib. 365; 10 Ib. 346.

In the case of *The Bank of Maryland* (6 Gill & Johns. 205) it is one of the points decided that a banking corporation, although it may, by a transfer of all its property, render itself powerless to discharge the purposes of its institution, yet it still is a living and existing corporation, and this is practically exemplified in a subsequent case in which the same bank was plaintiff: 7 Gill & Johns. 448, and see also *The Farmer's Bank of Delaware v. Beaton*, Ib. 421. In the face of these authorities, I cannot undertake to say that the American Life Insurance and Trust Company is a lifeless institution. It still retains its character with all the legal capacity it ever possessed; and this, with all its attributes, must be resolved into their original elements before the stockholders can step into this or any other court of judicature and ask to have the fragments gathered up and distributed among them. A proceeding for that purpose must be had in Maryland where this company originated. Her tribunals of law or equity are doubtless competent to afford the proper relief either by virtue of the common law powers or by virtue of their statutory jurisdiction if any has been conferred in such cases. Although a denizen of this state, this corporation is foreign and alien to our laws and over which, for the purpose of dissolving it and winding up its affairs, the courts of this state can have no jurisdiction.

The views which I have thus taken of the case and the conclusions I have formed render it unnecessary to consider what effect certain proceeding which some of the complainants in this bill and other stockholders of the company appear (from papers recently submitted to me) to have taken before the chancellor of Maryland, would have upon the proceedings in this suit.

As the present bill entirely fails in my judgment, for the want of jurisdiction, the complainants are left to pursue such

remedy in Maryland as they should be advised is the proper one to dissolve this corporation ; and when that is done, and as ancillary to a receivership appointed there, if such should be the case, this court may lend its aid in relation to any property within this jurisdiction.

The order made upon the bill in this cause must be discharged, with costs to be taxed.(a)

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MURPHY *et al.* v. HARVEY and others.

Testator bequeathed to his brothers, J. and M. and sister M. and their children all his estate, "and in case of the death of either of them, to their heirs, to be equally divided among them who shall survive and the children and heirs of the deceased." They all (J. and M. and M. the sister) died before the testator. Both the brothers and sister left children, while one of the sons of the sister had died also leaving children. Held, that these children (the sister's grand-children) were to be let in and took *per capita*.

The word *children* is not to be converted into a word of limitation, except under a necessity in order to carry out a testator's intention.

The words *to be equally divided*, when applied to a gift to several persons of different degrees of consanguinity to the testator, supersede the manner of distribution by the statute.

BILL filed for a construction of the will of Peter Murphy, Will.  
late of the city of New York, gentleman, deceased ; and for *Per capita.*

(a) The chancellor, in affirming this opinion, decided that where the officers and trustees of a corporation have assigned its property which is in this state to persons residing here and the rights of the stockholders are thereby endangered, this court has power to grant relief, although the corporation itself is located in another state. But that while the corporation is in existence, the relief which this court or any other court of chancery is authorized to grant would not extend to a distribution of the funds of the institution among its stockholders. Before that can be done, the proper tribunal having jurisdiction of the question must have dissolved the corporation or declared its privileges and franchises forfeited. That to such an application as was made in this case the corporation was a necessary party ; and that the assignment of its funds to trustees would not dissolve the corporation so as to render it unnecessary to make it a party to the suit.

Words  
"Children"  
and "to be  
equally di-  
vided."

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a distribution of personal property under it. There was but one bequest in the will, which ran in these words: "*Impri- mis*. I give and bequeath unto my brothers, James and Michael Murphy and sister Margaret and their children, all my estate, real and personal, as well in law as in equity, in possession, remainder or reversion; and in case of the death of either of them, to their heirs to be equally divided among them who shall survive and the children and heirs of the deceased."

The brothers and sister, Margaret, James and Michael, died before the testator.

Margaret, prior to her death, had married one John Lawler, who was also dead; but they had five children, namely, Mary, Elizabeth, Thomas, Peter and Michael, the said last mentioned Michael having died and left five children; and the main question for the court was, as to whether these children (grand-children to the testator) took and to what extent.

James and Michael Murphy, the brothers of the testator, left several children who were named and made parties.

Mr. *Robert Emmet* and Mr. *A. L. Robertson*, appeared for different parties.

THE VICE-CHANCELLOR:—"Equality is equity." Under the will, the two brothers and sisters of the testator, had they survived him, and their children living at his death, would have taken in equal shares *per capita*; all faring alike in the division and distribution of the property: the word *children*, as used in this will, being a word of purchase constituting all who answer the description devisees or legatees in their own right. "Children" is naturally a word of purchase and is not to be construed or converted into a word of limitation, except from necessity in order to carry out the intention of the testator in giving effect to the will: *Buffar v. Bradford*, 2 Atk. 291; 1 Roper on Leg. 70.

The brothers and sister of the testator having died before him, an event provided for by the will, the children surviving became legatees. The words "and in case of the death of either of them, to their heirs to be equally divided among

them who shall survive," carries the gift of the whole estate over to the children who have survived their parents, *per capita* and not *per stirpes*: the word heirs, as there used, being of the same meaning as the word children and the further words "and the children and heirs of the deceased" forming the concluding part of the same sentence were evidently to include, in the survivorship, the children of any deceased child of a brother or sister and, of course, lets in the four children of Michael Lawler, deceased, the grandchildren of the testator's sister Margaret, to take. Whether they take, also, *per capita* or only the share which would have belonged to their deceased father, Michael Lawler, is somewhat a question. I think, however, in accordance with the rules laid down by Mr. Roper and the cases cited by him, (1 Roper on Leg. 127, 128) that they take *per capita* in their own right and not as representatives of their deceased father, of what would have been merely his share. The controlling words are "to be equally divided." The words, when applied to a gift to several persons of different degrees of consanguinity to the testator, supersede the manner of distribution which the statute of distributions has prescribed. I assume, from the pleadings, that Michael Lawler died before the testator. If the fact be otherwise, that is to say, if he survived the testator, then his four children are not legatees, but the share vested in Michael the father and should be paid over to his legal representatives, namely, to his executor or administrator who should be before the court. There is enough, however, stated in the bill and admitted by the answers to show that Michael Lawler died before the testator. So, with respect to the death of those of the children of the testator's brother James and of his sister Margaret, namely, Thomas Lawler, Peter Lawler and James Murphy, there is enough for what is stated to warrant the presumption of their death and to authorize the making of a decree excluding them.

*Decree*, that the costs of the parties to the suit, excepting John Clements, be, in the first place, paid out of the fund in the hands of the administrators; and that they, then, distribute and pay over the residue equally to and among the parties named *per capita*, &c.

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LEAVITT, Receiver of the North American Trust and Banking Company v. YATES and others.

Where an act is done by a company pursuant to a resolution of a board of its directors at a meeting not objected to by its officers at any time, the mere regularity or irregularity in the convening of that board will not be an objection to the act done. The power to do the act is another question. An association, under the general banking law, may borrow money to discount notes and also to purchase state stocks and other securities to be deposited with the comptroller; but it has no right to borrow money to be used in speculations or in mercantile or other business having no relation to the ordinary business of a bank.

Directors of a company are but agents for the benefit of others.

If an association under the general banking law has made extensive operations of a speculative character in state stocks and, thereby, become greatly embarrassed, it cannot raise funds by an issue of its notes or obligations, secured by a pledge or assignment in trust of its remaining assets in order to satisfy creditors whose demands have not grown out of legitimate banking business. It may be different where the demands of existing creditors grow out of legitimate banking business, and provided the money expected to be raised is necessary and intended to be applied to discharge *bona fide* debts of that character. And where such a pledge and an assignment in trust has been made, and it is difficult, before proofs have been taken, to discriminate between the character, *bona fides*, and the legitimacy of the claims of creditors thereunder, it is the duty of the court to grant an injunction and appoint a receiver.

An unlawful transaction is not to be upheld merely because there has been honest intention and good faith in those who caused it. It must be judged by law and not by motive.

On the 15th of December, 1840, the North American Trust and Banking company issued 800 promissory notes, all of the same date, payable thirteen months thereafter, in favor of their clerk, who indorsed them, not for the purpose of adding anything to their security, but to give them currency without further trouble. Four hundred of them being \$500 each and the remaining four hundred for \$1,000 each (amounting in the aggregate to \$600,000.) At the foot of each note was this memorandum: "The payment of this obligation, with others, amounting in the aggregate to \$600,000, is guaranteed by the transfer of securities estimated at \$800,000, under a deed of trust executed between the company and H. Y., T. G. T. and W. C. N. Trustees, bearing even date herewith." These notes were delivered out principally to directors and agents to raise money and bring it into the association. *Held*, that these notes had so far the character of circulating notes as to be within the restraining law of 1830, (1 R. S. 712) and the act of May 14, 1840, and were consequently illegal. Also that they were void from the fact that they were not based on the pledge of securities with the comptroller nor intended to be countersigned and regis-

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tered as required by the banking law. Likewise that, the notes being void, the accompanying trust deed, made for their security and payment, had no legal effect and was void. *It would seem* also that such trust deed was fraudulent in law as tending to hinder and delay creditors. Still it might be that creditors dealing with the company in legitimate banking business and induced to accept some of these notes on the strength of the trust, at the same time relinquishing other securities, would be remitted to their original rights and securities. No protective equity, however, attached in favor of parties on the ground of their having bought and paid for exchange or made loans or advances of money or assumed liabilities for the company, or given up its certificate of deposit on the strength of having received, as security, the notes and the trust merely on the faith of the security the latter was intended to afford. But, if the parties, on taking the notes, had been expressly promised or had expressly stipulated for a pledge or hypothecation of bonds and mortgages or other securities, as collaterals, (the notes proving to be illegal and void) they might insist on a fulfilment of the stipulation in respect to the pledge by way of equitable mortgage; and the court, on proof, which must not be feeble, would compel a restoration as a condition of annulling the new security.

And, on this latter principle, where a *bona fide* creditor of the association had had bonds and mortgages assigned to him as security, and was encouraged to give up such bonds and mortgages and take some of the said notes embraced by the said trust-deed on an urgent assurance from the president (and the being shown a written opinion of the counsel of the association) that such notes were valid and well secured by the trust deed, and the said bonds and mortgages still remained as part of the assets embraced by the said trust and had not been passed away. *Held*, that such creditor, (the court deciding against the trust deed) was entitled to a restoration of the bonds and mortgages.

Where a trust deed, made by a banking association with a view to protect the holders of its certificates, is set aside, a holder who was induced to take some of them and give up bonds and mortgages which the association had before transferred to him as security for indebtedness, and this was done at the request and upon the earnest assurance of the association of the validity of such trust-deed and certificates, and an opinion of counsel was shown by way of further inducement. *Held*, that the holder was, through his answer, entitled to have the bonds and mortgages restored to him without the necessity to file a cross-bill.

Trustees of an invalid trust, who reasonably defended it but who were cognizant of all the transactions out of which its invalidity arose, decreed to bear their own costs.

The right of a banking association to purchase state stocks attaches only when the object is to effect a deposit or pledge of the same for circulating notes, or, if for any other purpose, it should be the investment of capital or surplus funds for the sake of interest. It should not be done on credit and by a deposit of their securities and for speculation with a view to profit.

Nor can such an association purchase upon credit (not for an investment) depreciated paper of the banks of other states at a discount, with an intention to re-sell the same at an expected profit or to be laid out in cotton at the South to be shipped to Europe.

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Nor can such an association, especially while it is in pecuniary difficulties, buy up, with its own bills of exchange, shares of its own capital for the purpose of being sold again and, in the mean time, of being used as a means of raising money.

The revised statutes, on the subject of preventing the insolvency of monied corporations and to secure the rights of creditors and stockholders, apply to associations under the general banking act of 1838.

Trust-deed set aside on the complaint of a receiver: as the court considered the trustees so placed that they could not well do otherwise than defend it, and yet, as the fact was that they were not strangers to the transactions out of which it arose and accepted the trust knowingly, they were decreed to bear their own costs; and the receiver was allowed his costs out of the fund.

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6, 9, 10, 11,  
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Associa-  
tion.*

*Corpora-  
tion.*

*Directors.  
Assign-  
ment.*

*Trust  
Deed.*

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*Cross Bill.*

*Costs.*

*General*

*Banking*

*Law.*

*Receiver.*

BILL filed to set aside a certain trust deed or instrument in writing, bearing date the fifteenth day of December, one thousand eight hundred and forty, executed between the North American Trust and Banking Company of the first part, and the defendants, Henry Yates, Thomas G. Talmage and William Curtis Noyes, as trustees of the second part; and to have the securities transferred to the said trustees, by means of the said instrument for the purpose of securing the payment of certain notes of the said company, delivered up to the complainant as receiver of the effects of the said company.

The bill alleged that the complainant was informed and believed that, in the latter part of June or the beginning of July, one thousand eight hundred and thirty-eight, articles of association were entered into by certain persons to carry on the business of banking, under the act in that case made and provided, passed 18th April, 1838. That the name assumed was *The North American Trust and Banking Company*: that the association was regularly organized under the act and by articles of association; and commenced the business of banking, until enjoined by the court of chancery. That, by an order of the court in the case of *George M. Tracey v. Thomas G. Talmage*, president of the North American Trust and Banking Company, the company, its officers and agents were suspended from exercising any rights, privileges or franchises; and it was ordered that a receiver should be appointed and the company, its officers and agents should deliver over all the property and effects, &c. That, pursuant to the act respecting the appointment

of receivers of monied institutions, passed 27th April, 1841, and to the above mentioned order and by a further order the complainant was appointed receiver; and had accepted the trust, &c., under the control of the bank commissioners, by whose direction this suit was instituted. That, on or about the twelfth day of October, in the year one thousand eight hundred and forty-one, the company and its officers assigned and delivered over the property, &c., to the complainant as such receiver. That, an agreement was made between Thomas G. Talmage, President of the said association, for and in behalf of the said association, of the first part and the defendants, Henry Yates, Thomas G. Talmage and William Curtis Noyes of the second part; and that there was annexed thereto a schedule of the bonds, properties and effects embraced thereby, as well as the blank form of proposed promissory notes or obligations to be issued thereunder.

That the bonds, properties and effects mentioned in this schedule were, in fact, delivered to the trustees and have been and are now retained by them under color of the said instrument; and that Thomas G. Talmage, as president, executed assignments of them. That the book of minutes of the proceedings of the board of directors set forth a meeting of the board on the fourth day of January, one thousand eight hundred and forty-one and a resolution then passed to create a new trust, authorizing the officers to select the securities and place them in the hands of the said defendants, Yates, Talmage and Noyes, and to execute the necessary papers prepared by the counsel to carry said trust into effect. That the meeting was not a regular quarterly meeting nor any meeting provided for by the articles of association or bye-laws; that it did not appear from the said minutes by whom or in what manner it was convened or that the notices were given as required by the bye-laws and the bill. Charged that the meeting was irregular and the proceedings illegal and void; and insisted, that there was no other resolution in the said minutes nor any other authorizing the making of the said agreement or the delivery of the said property or the issuing of any notes under it. The bill also showed, that eight hundred bills or notes, purporting to be made by the said association, were issued or put in circulation by the

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association or its officers or agents about the time of making the said instrument in writing of even date with the same, payable to the order of Elam H. Gibbs in thirteen months with seven per cent. interest, and that four hundred of them were for a thousand dollars each, and a like number of them for \$500 each, making, in all, six hundred thousand dollars, and that copies of the notes are annexed.

The following is the form of one of such notes, (those made out for \$1,000 each were exactly similar.)

*New York, December 15th, 1840.*

*North American Trust and Banking Company.*

\$500 dls. No.

*Thirteen months after date the North American Trust and Banking Company promise to pay at their Banking House to the order of Elam H. Gibbs for value received, the sum of five hundred dollars, with interest thereon at the rate of seven per centum per annum.*

*Thomas G. Talmage,  
President.*

*D. E. Tylee,  
Cashier.*

*☞ The payment of this obligation with others amounting in the aggregate to \$600,000, is guaranteed by the transfer of securities estimated at \$800,000, under a deed of trust executed between the Company and Henry Yates, Thomas G. Talmage and William Curtis Noyes, trustees, bearing even date herewith.*

*Five hundred dollars.*

Also, that the said notes or bills were endorsed in blank by Gibbs, before being issued; that Gibbs was a clerk in the bank, but the notes were not made payable to him for the purpose of paying any indebtedness of the association to him, nor received by him for any *bona fide* or valuable consideration: but were so made payable and indorsed solely for the purpose of making them negotiable and transferable by selling as if they had been made payable to bearer. That Gibbs was insolvent; and did not endorse them for security. That there was no resolution of the directors authorizing the issuing of the said notes, but the one

passed on the fourth day of January, one thousand eight hundred and forty-one. The bill charged that they were not issued by virtue of any resolution or authority of the board of directors. Also, that the trust agreement was made and the property under it delivered solely for the purpose of securing the holders of the said bills or notes. The complainant submitted that the issuing, &c. of the notes or bills was illegal and contrary to an act to amend the act entitled "An act to authorize the business of banking," passed the 14th day of May, 1840, and contrary to the act to authorize the business of banking; and that the bills were void and all conveyances connected with them. He also insisted that the bills were not delivered to the company by the comptroller or secured by the pledge of property with him, nor countersigned or registered in the comptroller's office; and that the issuing was an illegal attempt to evade the general banking law. Also, the bill charged that when the said instrument in writing was made and the said notes, &c. were issued, the North American Trust and Banking Company were insolvent and had long before been embarrassed and unable to meet its pecuniary engagements without extensions and sacrifices and borrowing money by unusual means. Also, that the said company had long before the said fifteenth day of December, one thousand eight hundred and forty, in order to pay its debts or obtain extensions or renewals, transferred to trustees about two million five hundred thousand dollars of its bonds and mortgages received for stock or certificates or debts or discounted. Also, that about three-fourths of the capital stock was so assigned to secure the payment of three separate sets of bonds dated February, one thousand eight hundred and forty; and payable, one million five hundred thousand dollars on the first day of February, one thousand eight hundred and forty-five and five hundred thousand dollars on the first day of February, one thousand eight hundred and forty-seven; and that the said bonds were made to procure money to meet debts incurred by losses which the company could not meet in the regular course of business or to aid in extensions or renewals; and that but a small portion of the moneys raised from them was used in

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the banking. That the company was prevented from suspension and open and public insolvency by the said resort to unusual means to raise money ; and that it was, several times, on the eve of suspension before making the said instrument in writing ; and particularly in July, one thousand eight hundred and forty. That the said instruments in writing and the notes or bills issued under it were made to meet some outstanding debts or to raise money to pay the same or to obtain a further renewal or extension of the same and not in the regular course of the business of banking or for the purpose of banking, &c. That at and before the issuing of the said notes and before the said fifteenth day of December, one thousand eight hundred and forty, the said association was insolvent ; and that the said instrument in writing was made and the said notes paid out and delivered and the said property conveyed to the said trustees when the said company was insolvent or in contemplation of insolvency, with the intent to give a preference to some particular creditor over other creditors and was so received by the said trustees ; and that there were other creditors, to a large amount, whose claims were not secured by the same. That nearly all the property and effects, remaining in the hands of the directors, were embraced and delivered over in and by said instrument in writing. That the company had no considerable remaining capital or means adequate to carry on the business of banking ; but was deprived of the same and disenabled to carry on the said business of banking by means of such transfer. Also, that the security of the creditors of the company not thereby provided for was impaired by the said transfer : the property and effects not being under the control of the directors chosen by the stockholders or provided for by the said act to authorize—and that said transfer and delivery was illegal and not authorized by the articles of association or bye-laws. That the nominal amount of the property so set forth was about one million of dollars ; but that it was estimated at the time at eight hundred thousand dollars. That the said trustees had not given any security, &c. ; that they were not responsible to the amount thus committed to them. And that Talmage and Yates were among

the original associates who formed the said association and were elected in the first board of directors. That the defendant Yates was chairman of the committee of investments and finance from its organization in July, one thousand eight hundred and thirty-eight, up to the month of August, one thousand eight hundred and forty; that the defendant Talmage was chosen a member of the said committee about the thirteenth day of August, one thousand eight hundred and forty, and acted as such until the resignation of Yates on the fifth day of August, one thousand eight hundred and forty, as chairman, when Talmage was elected chairman; that Talmage was vice-president and was elected president in the latter part of one thousand eight hundred and forty, and continued to act until suspended and enjoined. Also, that all the trustees had full knowledge of all the matters before alleged so far as they in any manner affected the said trust. That the said property and effects were, by the said instrument in writing, held by the said trustees for the holders for the time being of the said notes or bills of the said company respectively, according to the amount held by each individual after default in payment and the said property and effects were, by the said instrument in writing, to be realized or collected and the proceeds paid to such holders so as to discharge the said notes if sufficient and if not sufficient for a payment in full, then, in rateable proportions. That there was no power given to the said trustees to discriminate between *bona fide* holders or holders for full value and such as hold the said notes as collateral or without consideration or for a partial or illegal consideration; nor had the said trustees any power to adjust or ascertain the amount or legality of any demand set up by the holders of the said notes or bills against the said company or to refuse payment of any part of the notes held for the time being by any person in case the amount were greater than what was actually due.

The bill then set forth the present holders of the notes, so far as they were known; and among these were the defendants Messrs. Palmers, McKillopp, Dent & Co., The Bank of the United States, The Girard Bank, William Vyse, De Launay & Co., Ezra Clark and The Fund Commissioners

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of Illinois. And the complainant stated his fears that the property in the hands of the said trustees would be paid in part to persons who had no legal claim against the said association or no claim to the amount of the notes held by them and to insolvent persons from whom it could not be recovered, &c. or that the receiver would be put to trouble and expense in recovering the same. Also, it was alleged that there were other respects in which it would be inequitable and unjust to the other creditors and to the stockholders and receiver to apply the said trust funds to the payment of the holders for the time being of the said notes. Also, that some of the notes were delivered to S. D. Dakin, an agent, to raise money; and no full or complete account had been rendered by him. Nor did it appear from the books of the company nor had the complainant any knowledge whether the said notes, committed to said agent, remained in their hands or had been parted with and put in circulation. Also, that the said notes were none of them issued on the day they bore date, but at different times thereafter, yet bore interest from their date and it appeared from the books that the said interest was not in many cases accounted or allowed for when they were issued. That in the months of May, June and July one thousand eight hundred and forty-four a quantity of the said notes, to the amount of seventy-six thousand five hundred dollars or thereabouts, were returned or repaid to the said association in the course of business and that all of the said notes or bills so returned were afterwards, but at what particular time was to your orator unknown, reissued or again put in circulation by the said association or its officers, so that none remained on hand or came into the complainant's possession as receiver, except two of the said notes or bills for five hundred dollars each. That the bills would become due on the fifteenth day of January one thousand eight hundred and forty-two and that the receiver had not funds and had no prospect of obtaining any to pay them even if he ought so to do. That the assets of the company were represented in the annual statement under oath of the president on the fourth day of July one thousand eight hundred and forty-one as follows :

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|------------------------------------------|----------------|
| Real estate belonging to the association | \$13,450 00    |
| <i>Shares of stock held absolutely :</i> |                |
| State Stocks at par . . . . .            | 1,755,040 00   |
| Other stocks valued at . . . . .         | 48,250 00      |
|                                          | <hr/>          |
|                                          | \$1,803,290 00 |
| Amount of debts due the association      | \$5,580,251 37 |
|                                          | <hr/>          |
|                                          | \$7,396,991 37 |

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And the debts of the company as follows :

|                                                         |                |
|---------------------------------------------------------|----------------|
| Amount of debts due from the associa-<br>tion . . . . . | \$4,652,665 41 |
|---------------------------------------------------------|----------------|

And that the assets which came into the hands of the receiver were of little value. That it was morally certain that default would be made in the payment of the said bills ; and that the duties and powers of the trustees consequent thereon would take effect. That the complainant was advised and insisted that the said defendants, trustees, were officers and agents of the said association and were, under the order of the court aforesaid, restrained and ought to have delivered over the said property and effects to the complainant on his appointment as receiver. Also, that if the said trust be not wholly illegal and void, but be held good for any purposes, the said trustees should be removed and the complainant be substituted, as they are not officers known to the law and have a compensation not fixed by law and have no power to adjust and compromise ; whereas the complainant is the officer appointed to liquidate the affairs of the said company under the direction and advice of the bank commissioners.

That the bill also showed that the said Yates, &c. (trustees,) had already collected considerable sums ; and were proceeding to collect and foreclose and also promised to declare a dividend in January one thousand eight hundred and forty-two. That the principal management of the business was in the hands of the defendant Talmage ; and that Yates was a holder to a considerable amount of the said bills issued under the trust. Also, that twenty-nine thousand dollars are not accounted for in the books, &c.

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*Prayer :* That the instrument in writing and all assignments or agreements pursuant thereto might be decreed null and void and be discharged of record. Also, that the said trustees might be forthwith ordered and finally decreed to transfer and convey, on oath, before a master to the receiver, all the property and effects received under the said trust remaining in their possession; and execute all proper instruments and deliver over all property received in exchange or payment or in satisfaction of any of said trust or effects. Also, that they might account for all monies, properties and effects received by them at any time through or by means of the said instrument in writing on oath before a master and might assign and transfer it to the receiver. And that if it should appear, on such accounting or otherwise, that the said trustees had paid out or parted with any of the said property or its proceeds, that they might account for and pay over, in money, the full value of the property so parted with and make good any deficiency in the said trust funds. That they may deliver over all title deeds, vouchers, &c; and that they might discover and set forth the present holders of the said bills or notes at present unknown to your orator, so that they may be made parties to this bill. Also, that if the said instrument in writing should not be declared void, that, then, the said trustees might be removed and the complainant be substituted. And that the said trustees might be forthwith suspended from their powers, privileges and franchises; and be enjoined and restrained from exercising them. Also, that they might be enjoined from selling, transferring, &c. any of the said property, except to the complainant as such receiver; and from destroying, cancelling, discharging, &c. any of the same. And from collecting or recovering any money on account of the same or foreclosing, &c. And from paying over any monies, effects, &c. to any of the holders, &c. And that the receiver, complainant, might be substituted in all suits brought by them. Also, that the complainant might have a reference, with leave to examine the defendants and others on oath respecting any property in their possession or in regard to papers, &c. And also, general relief.

The trustees and different holders of the notes were made defendants.

The defendants, the trustees, by their answer, admitted *inter alia* that the meeting at which it was resolved to form this trust, was not a quarterly meeting or one expressly provided for by the articles or bye-laws and that it did not appear, by the minutes, by whom it was convened. But that the bye-laws gave power to the president to call such said meeting and that the cashier or second cashier should sign the notices and eleven directors would have to form a quorum. Averment, that the said meeting was directed by the president and that notices were issued by the second cashier and transmitted to directors; and that fourteen directors (named) attended and voted the adoption of the preamble and resolution set forth in the bill. Also, that the said meeting was regular and the proceedings valid. The defendants admitted that there was no minute of any vote authorizing the said instrument or the delivery of the said property to the said trustees or the issuing of the said obligations as stated, save the said preamble and resolution of January the fourth one thousand eight hundred and forty-one. They admitted that no other resolution ever authorized the said agreement or the delivery of the property or the issuing or circulation of the notes; but insisted that this resolution and preamble did authorize fully the said agreement and the transfer and making and issuing said obligations. Admitted that the eight hundred obligations were made and signed as set forth and described; but denied that they were put in circulation as charged or as money, or to answer the purpose of circulating notes, or loaned or used as payment or in any way circulated or used as exchange. They admitted that Gibbs was a clerk and that the said notes were not made payable to his order or delivered to him in payment of any indebtedness; nor for a valuable or any consideration. But they denied that they were made payable and delivered to Gibbs in pursuance of any agreement as stated or to make them negotiable by delivery merely. They admitted that Gibbs was not a man of much property and that his endorsement was not procured to increase the security of the notes; but as

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to his being wholly irresponsible, they left complainant to his proof. They admitted that the said minutes contained no record of adoption of any resolution authorizing or in anyway relating to the said obligations, save the said resolution and preamble of January the fourth one thousand eight hundred and forty one; and that no other way ever was adopted by the said directors; but they insisted that the said resolution and preamble did fully authorize them. Also, that whenever any of the obligations should be delivered to any other person as security for advances or liabilities or in payment of debts or pledged for valuable consideration, then, by means of said execution, transfer and delivery of property and also delivery of obligations and agreements accompanying each delivery, it was intended to convey and vest an interest in the said property to the said person or persons. And they denied that the said writing was executed or the property assigned by way of special indemnity or pledge for payment of principal and interest. They submitted that the making and using of the said obligations, in the manner set forth in their answer, was not contrary to any law or statute of this state, but were authorized by law and the articles and bye-laws; and all acts done by means of the said instrument were legal and valid and binding on the association and on the complainant as receiver. They admitted that said obligations were not furnished, registered or countersigned by the comptroller nor in any manner secured in conformity with the act to authorize the business of banking.

In reply to the charge of insolvency at the date when the said notes were issued, the defendants annexed a schedule, containing the result of the investigation of the committee of five, dated October the 1st 1840, showing that the assets exceeded the debts of the said association by two million three hundred and twenty one thousand three hundred and ninety-five dollars and thirty-five cents, after deducting, for estimated losses, four hundred and fifty-six thousand eight hundred dollars, leaving the capital stock about seventy dollars per share. The defendants Talmage and Yates, from knowledge, and Noyes, from belief, further stated that its condition from the first of October one thou-

said eight hundred and forty to the first day of January one thousand eight hundred and forty-one, (the date of said agreement and issue,) remained essentially the same; and that the said estimate of the committee was founded on the then fair market value of the stocks, property and demands and was a true statement of assets and liabilities; and, therefore, it was not insolvent, but had a surplus of property over its debts. The defendants admitted that the said association had purchased state stocks to the amount of more than four millions of dollars and also southern and south-western bills and had sustained losses by the depreciation of said stocks and bills; and that their means for carrying on business were diminished. They asserted that the directors and business men in general looked for a favorable change in business, revival in trade and higher values generally with the commencement of one thousand eight hundred and forty-one. Also, that the banking institutions of the country were expected to resume specie payments in January one thousand eight hundred and forty-one. Also, that as the said committee had reported the institution solvent, it seemed desirable to obtain temporary aid, in order to enable it to hold on through the year one thousand eight hundred and forty-one, in order to reap the benefits expected of increased prices. That instead of selling property in the then depressed state of the markets, it was deemed expedient to obtain funds by resorting to a pledge of its assets. That with a view of ascertaining whether loans could be obtained by pledge, a paper was prepared and signed, but the subscription was not to be binding unless four hundred thousand dollars was subscribed. Two hundred and forty-five thousand dollars was subscribed. That having obtained subscriptions to so large an amount, it was deemed advisable to execute the assignment and delivery of property, as stated, to the defendants and make the said notes and apply the said means—trusting that the whole sum required would be obtained—especially as the directors had verbal assurances from the subscribers that they would advance the sums subscribed at any rate. They denied any intent to violate or evade any law by any transactions or to act beyond their powers

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or that the said notes were put in circulation as or used for money or issued in payment for notes discounted or to persons borrowing or as exchange. They denied that the agreement and obligations were executed to meet debts, raise money to pay them or to obtain extensions or renewals by pledging as collateral or otherwise except as before stated. They denied the insolvency of the institution or that, by transactions, any preferences were intended of one creditor over another or any unlawful purpose effected or intended. And they submitted that, even if the association were insolvent, their legal right would have been perfect to execute the agreement, give preferences and make assignments, transfers and pledges. They admitted that there were other creditors to a considerable amount not secured by those transactions, but much the larger part were thus secured by the said pledge made in connection with the construction of the debts. But that after the said delivery to the defendants, there remained upwards of seven hundred thousand dollars worth of property and residuary interests in the property pledged amounting to two million four hundred thousand dollars which would have enabled the association to continue its business but for the extraordinary depreciation of stocks and property and the general failure of banks and business. They admitted that the property so pledged was placed beyond the control of directors to the extent specified in the agreement and assignments and still remained so by virtue thereof. They admitted that the nominal amount of property assigned to them to be as charged, but were unable to estimate the then present value, because it was greatly depreciated. They admitted that they had given no security except what might be found in covenants. They neither admitted nor denied their irresponsibility compared with the amount of property committed to them; but they stated that they had considerable property or were in the receipt of income or were then free from embarrassment. They admitted that Talmage was one of the original associates and that Yates became so soon after it was formed; and that they were both among the first directors elected. That Talmage had for the greater part of the time and Yates constantly when in the city acted as direc-

tor until the injunction ; and were also members and chairmen respectively of committee of investments and finance, but that Yates was absent from the city on the meetings and was only partially acquainted with the proceedings. That Talmage was vice-president prior to the twenty-eighth day of October one thousand eight hundred and forty, when he was elected president and so remained until the injunction was served. Also, that the defendants Talmage and Yates had full knowledge of its condition, affairs, articles, bye-laws and proceedings and a general knowledge of its means, resources, operations, creation of trusts and of the obligations or notes as admitted in their answer, but not otherwise ; and that they had notice of the circumstances affecting the said trust when they accepted the same as therein stated. The defendant, Mr. Noyes, stated that he had never been a stock-holder or acquainted with its affairs or situation except from general report, and from communications made for the purpose of obtaining his legal opinion and advice ; and that, at the date of the said agreement and acceptance of the trust by him, he had no knowledge of the solvency or insolvency, debts or assets, except from the report of the committee hereinbefore referred to, nor as to agreement and obligations other than what appeared thereon and that they proposed to raise money thereon for general purposes. Likewise, that he was not the legal adviser or in the habit of being consulted by the association, and only when called upon by and associated with their counsel John L. Graham ; and that his opinions were always given in writing upon a statement of facts. Also, that, at the time of the execution of said agreement, he had seen the report of the special committee before referred to and supposed the association solvent and in possession of a considerable surplus ; and that, at the time mentioned, he had no knowledge of its affairs or of the proceedings of its directors, committee or of its embarrassments, alleged insolvency or inability otherwise than as is therein set forth ; and he left the complainant to his proof. The said defendants submitted that, by the terms of the said agreement in execution of their trust, they were bound to discriminate between *bona fide* holders of the said notes, and holders for partial or illegal consider-

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ations or holders without consideration, and also that they were empowered to liquidate and settle the amount due and the legality of any claim set up by holders of the said obligations against the said association or trust funds, and to refuse payment whenever more was claimed than was due. In a schedule they set forth the names of the parties to whom said obligations were originally delivered; and in another schedule the names of the present holders as far as they were known. These defendants also stated, on information and belief, that J. B. Murray held from twenty-two thousand five hundred dollars to thirty-two thousand five hundred dollars of the said obligations; two thousand five hundred dollars of which were given to him for his note subsequently paid by him, and the residue was received by him for services in Europe as agent for the said association. The defendants respectfully submitted that it would not be unjust to other creditors, stock-holders or to the complainant as receiver, to apply the property to the purposes specified in the trust agreement. But that it would be unjust to deprive the holders of these obligations of their vested rights. They admitted that, at various times in May, June and July, one thousand eight hundred and forty-one, obligations, to the amount of seventy-six thousand five hundred dollars were returned to the said association and again delivered to other parties as collateral security for loans made on the credit thereof and in payment of debts, so that but two of the said notes for five hundred dollars each, numbered 434 and 596, came into possession of receiver. They submitted that there was no reason why these trusts should be withdrawn by this court, as the defendants were selected and approved, both by the association and those intended to be interested therein; and their conduct, thus far, was satisfactory. Also, that the execution of their duties did not conflict with the proper duties of complainant. The defendants stated that they had collected some moneys and were collecting more by foreclosure suits, and should take further means to realize by sale or otherwise; and denied any intention to make a dividend, or that they ever declared any such intention. They admitted that Talmage was principal manager, but said that he was so under constant super-

vision of the others. They admitted that they declined to cease from acting as trustees; and they insisted that the said instrument was valid and binding upon all the parties; and conveyed all necessary powers on defendants. Also, that the said notes or obligations were legal and valid and evidences of debt. And, that by means of the said transfer and delivery of obligations, the said property became pledged for the payment of the respective sums due to the persons to whom they were delivered. That the said notes or obligations were delivered as evidences of debt and as evidences of pledge, and as evidences of delivery; and were not put in circulation as money, but were simply contracts for payment of money guaranteed by pledge and made negotiable for convenience and for the purpose before stated. Also, that in all cases of loans, the amount of obligations delivered agreed precisely with the sum loaned, and, so, when received in payment of debts; and admitted that when parted with as security collateral to business promissory notes of this said association that they were transferable by delivery and the payee had no interest therein in any way. And they denied that they were issued or intended as circulating notes; or endorsed for the purpose of enabling them to have a circulation as bank notes or money: for they then had a circulation countersigned and secured in the usual way under the general banking law. They denied that, on the fourth day of January, one thousand eight hundred and forty-one, the said association was insolvent or that the said agreement was made and the effects transferred when insolvent or in contemplation of insolvency and with intent to give preferences; and charged the facts to be as thereinbefore set forth. They submitted that even if the obligations were adjudged void, the moneys advanced, liabilities assumed and debts for which they were given as collateral securities should be paid from the said property by reason that a lien then existed in virtue of such transactions. That even if the agreement were declared void and the property directed to be given up, it ought not to be so, save on terms of paying the amounts loaned and advanced and amounts due to individuals for liabilities incurred as aforesaid, and amounts due to those who took such obligations for debts due and relin-

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quished other securities of value. They averred that they had no knowledge of any illegality in the said meeting of the fourth day of January one thousand eight hundred and forty-one, nor in the said notes, nor were they aware of any want of authority on the part of the president and directors to make the said instrument. The said defendants admitted that before the creation of the said trust, and particularly in May, June, July and August in the year one thousand eight hundred and forty, the association was embarrassed in its pecuniary concerns; but did, up to the time and after the execution of the said trust deed, meet and pay all its debts and liabilities, except such as were postponed by agreements with the creditors. That, before the execution of the said trust-deed, the said association had obtained extensions of some of its debts, and had also made loans by sale of bonds and otherwise, which loans had been negotiated at considerable expense and, in some respects, upon unfavorable terms for the association. The defendants also admitted that, at special times during the progress of the business of the association, before the time of the execution of the said trust deed, it was ascertained that liabilities of association were shortly to mature, and to meet which there was not a sufficient amount of money immediately available on hand, and that in or about July, one thousand eight hundred and forty, a very large amount of liabilities matured, which the association had not available means to pay; and that, on such occasions, and particularly on or before the first day of July, one thousand eight hundred and forty, the officers of the association were obliged to resort to loans, sales of property, &c., to provide available funds to meet such payments. And the defendants said, that unless the officers had made such provision, a suspension of payments must have ensued.

The defendants, Palmers, Mackillop, Dent & Co., in and by their answer, stated that they held eighty-seven notes secured by Yates's trust deed. The defendant, John Horsley Palmer, one of the said firm, stated that the North American Trust and Banking Company being indebted to Palmers, Mackillop, Dent & Co. in a large sum, for moneys paid to the association and by accepting and paying bills drawn by such association on the said firm and for which such firm held col-

lateral securities, the said association, in July, one thousand eight hundred and forty, assigned to the said Palmers, Mackillop, Dent & Co. one hundred and twenty-five bonds each for two hundred and fifty pounds sterling and agreed to assign other bonds, the whole amounting to forty-five thousand pounds sterling, as security for the balance due the said firm and for accepting bills which the association proposed to draw on the said firm, to the amount of fifteen thousand pounds sterling. That it was represented to the said firm, that the said one hundred and twenty-five bonds, &c., were secured by an assignment of bonds and mortgages in trust. That, at or after the said one hundred and twenty-five bonds were placed in the hands of the said firm, the association, without previous advice, drew seven bills of exchange on the said firm and sold the same in New York, which were drawn by the president to the order of and endorsed by the cashier, dated July 31st, 1840 and one other bill of exchange dated August 8th, 1840, the whole amounting to ten thousand two hundred and fifty-seven pounds, seventeen shillings and four pence sterling. That Palmers, Mackillop, Dent & Co. accepted a portion of bills, dated July 31st, 1841, amounting to seven thousand five hundred and seventy-three pounds fifteen shillings and two pence sterling; but when they ascertained that other bills, to the amount of seven thousand five hundred pounds, had or would be drawn by the association, the said firm were, at first, unwilling to accept the same and so informed James B. Murray, the agent of the association, who thereupon exhibited a statement, showing the ability of the association to meet its engagements; and on or about the third day of September, one thousand eight hundred and forty, he agreed with the firm that if they would accept the bills of the association drawn subsequent to the first day of August, one thousand eight hundred and forty, to the amount of seven thousand five hundred pounds, &c., he would engage that the association should deliver such approved securities to the order of the said firm as would enable their agent to remit to them fifteen thousand pounds sterling, drawn and believed to be drawn by the association on the said firm against the said one hundred and twenty-five, and said other bonds amounting to forty-five

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thousand pounds. That it was agreed that the said one hundred and twenty-five bonds, &c., should be returned to the association upon the association delivering the said approved securities, &c. That, thereupon, the said firm agreed to accept such bills according to the said agreement; and that the said Murray gave an order to the said firm on the association for the said approved securities, &c. &c. That, after the making of the said agreement, the said bill of exchange, dated August 8th, 1840, for two thousand six hundred and ninety-four pounds, two shillings and two pence, was accepted and paid by the said firm; but the association drew no more bills against the said bonds. That Melville Wilson, shortly afterwards and on behalf of the said firm, brought the said bonds to New York and was authorized to obtain the said securities, &c., to remit to Palmers, Mackillop, Dent & Co., to reimburse them for the payment of the said bills (amounting to ten thousand two hundred and sixty-seven pounds, seventeen shillings and four pence.) That, thereupon, the said association induced the said Melville Wilson to agree to receive the said seventy seven notes secured by "Yates's trust," each dated December 15th, 1840: twenty-seven being for two hundred and six pounds each, and fifty for one hundred and three pounds each, amounting to fifty-two thousand dollars or thereabouts. That the said Wilson thereupon agreed to receive the said notes subject to ratification by the said defendant's firm. That the said notes were taken by the said Murray to London; and on the third day of March, one thousand eight hundred and forty-one, the said firm confirmed the said agreement made by Wilson and received the said seventy-seven notes as collateral security for the payment of the said sum of ten thousand two hundred and sixty-seven pounds, seventeen shillings and four pence and agreed to deliver up the said one hundred and twenty-five bonds, &c., and the same were delivered to the association, &c., and the residue of said bonds which had been promised the said firm were countermanded. The said defendant John Horseley Palmer answered that said James B. Murray, being indebted to the said firm in the sum of ten thousand pounds and being the holder and owner of ten of the said notes of association, each for two hundred and six

pounds, numbered from 111 to 121, some time in June one thousand eight hundred and forty-one and before the same became due, delivered them to the said Palmers, Mackillop, Dent & Co. in payment of the said indebtedness. That, as to the manner in which the said James B. Murray became the owner of the said notes, the said defendant Palmer stated that the said Murray originally received from the association from twenty-two thousand dollars to thirty-two thousand dollars of the said notes for monies paid and services rendered for the association before or after January one thousand eight hundred and forty-one.

The defendants, Victor and John B. DeLaunay, constituting the firm of DeLaunay & Co. of New York, also members of the firm of DeLaunay & Co. of Havre DeGrasse, France, bankers, in and by their separate answers said that they then held certain of the said notes (setting them forth) amounting to fifty-five thousand dollars.

And the defendant Victor DeLaunay answered that he and I. B. DeLaunay had been many years prior to the time thereafter mentioned engaged in business in New York &c. and were in the habit of drawing and selling bills of exchange on Paris; and that on the sixteenth day of April one thousand eight hundred and forty-one this defendant and I. B. DeLaunay sold and delivered to the said North American Trust and Banking Company nineteen negotiable bills of exchange drawn by the said firm in New York on the firm in Havre DeGrasse, payable at Paris sixty days after sight, for different sums, amounting in the aggregate to two hundred and fifty-three thousand and twelve francs and eighty-six centimes. That the association, at the time of receiving the said bills of exchange, agreed to provide for the same as thereafter mentioned; and, as a security for the performance of such agreement, they agreed to and did deposit with this defendant sixty-four Arkansas bonds for one thousand dollars each, as well as said twenty of the said notes for one thousand dollars each, and other twenty made out for five hundred dollars each, and also a promissory note of the said association for thirteen thousand dollars payable thirty days after date and which note, if paid, was to be invested in a bill of exchange on Paris and ap-

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plied in part fulfilment of the said agreement. That the said bills were drawn by the defendants firm on the faith of the said agreement and security. That the said defendant Talmage, the president &c., on receipt of the said bills and on the sixteenth day of April one thousand eight hundred and forty-one signed a paper, acknowledging the receipt of the said drafts of Messrs. DeLaunay & Co. and promising to return the same in fifty-five days from the date thereof in similar drafts adding interest at seven per cent. having deposited with them as collateral security aforesaid Arkansas bonds and forty notes of the association and therein giving full authority to sell the same immediately after the maturity of the contract in case of the non-fulfilment of the same. Also that as a further security the said association deposited with DeLaunay & Co. the note of the said association for \$13,000 payable thirty days after date, and which note, if paid, was to be invested in a bill as aforesaid. That the said association negotiated the said nineteen bills and the same were accepted and provided for by V. & I. B. DeLaunay ; but the association did not return the amount of the said bills in drafts or pay the said thirteen thousand dollar-note. That the association, with the consent of this defendants' firm, sold twenty-five of the said Arkansas bonds ; and purchased drafts and remitted them to meet, in part, the said nineteen bills and by which the amount due to the said firm was reduced, on the sixteenth day of June one thousand eight hundred and forty-one, to one hundred and sixty-seven thousand nine hundred and ninety-five francs, twelve centimes. On which day it was agreed that, on the receipt of bills by this defendant from the association for the said last sum, the said DeLaunay would renew the said credit, by delivering to the association another sett of bills to the amount of one hundred and fifty-thousand francs upon the security of the remainder of the said Arkansas bonds and the said forty notes. That this defendant thereupon received from the association bills drawn by various persons, amounting to one hundred and sixty-seven thousand nine hundred and ninety-five francs and twelve centimes, and delivered to the association twelve other negotiable bills drawn by DeLaunay & Co. in New York on DeLaunay

& Co. in Havre, payable at Paris sixty days after sight and amounting to one hundred and fifty thousand francs. The association agreeing to provide for the said bills substantially as on a former occasion and depositing with this defendant the remaining thirty-nine Arkansas bonds and the said forty notes as security &c., (and the said forty notes were still held by this defendant) and he, this defendant, delivered up to the association the said note for thirteen thousand dollars. That the said DeLaunay & Co. drew the said twelve bills on the said thirty-nine Arkansas bonds and the said forty notes as security therefor. That these defendants had no notice of and were not responsible for the improper use of the said bills by the association; and they charged that the proceeds of the same were applied by the association in regular banking business. That the said twelve bills were negotiated by the association and accepted and taken up by or on behalf of this defendant. That the association did not return the amount of the said twelve bills at any time in similar drafts or otherwise, except that the association, with the consent of the defendants' firm, sold fourteen of the said Arkansas bonds and purchased drafts and remitted the same to DeLaunay & Co. at Havre and by which the amount due to the defendants' firm was reduced, on the eighteenth day of October one thousand eight hundred and forty-one, to one hundred and five thousand two hundred and thirty-three francs and seventy-two centimes, equal to, exclusive of exchange, nineteen thousand five hundred and seventy-two dollars and forty-seven cents, which, with interest from the last mentioned day, remained due and unpaid to this defendant and I. B. DeLaunay. That the said Victor and John B. DeLaunay then held twenty-five of the said Arkansas bonds and also the said forty notes; and this defendant claimed to be entitled to the payment of the balance due to his said firm, out of the property assigned to Messrs. Yates, Talmage and Noyes. The answer of I. B. DeLaunay corresponded with the answer of Victor DeLaunay.

The defendant, Ezra Clark, in and by his answer, said that he then held six of the said notes secured by Yates trust deeds (describing them) amounting to five thousand dollars. This defendant averred that he was a *bona fide*

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holder of the said bonds for value by him paid therefor to the association. That he first became a creditor of the association about the first day of December, one thousand eight hundred and forty, by purchasing its notes or certificates of deposit to the amount of five thousand dollars, paying cash therefor and at that time believing the same to be valid securities and his purchase was made in good faith. That about July the twentieth, one thousand eight hundred and forty-one, he was induced to give up to the said association the said certificates of deposit, and to take, in lieu thereof, from the association, the said notes (secured by Yates's trust deed) which he then held and he did so on receiving no other consideration therefor except the sum of two hundred and sixty-five dollars twenty-four cents for interest—being assured that the payment of such new bonds was secured by the assignment of property to trustees for that purpose.

The defendant William Vyse, in and by his answer, stated that he held a certain portion of the said notes secured by the said trust deed (describing them) amounting to seventy thousand five hundred dollars. That, besides large sums of money which the association borrowed of this defendant, amounting to more than forty-nine thousand dollars, the said association, by its president, knowing that this defendant was desirous of purchasing good bills to remit to his mercantile house in England, represented that the association were authorized to issue sterling bonds; and urged the defendant to purchase; and this defendant did purchase, on the twenty-eighth day of August one thousand eight hundred and forty, of the association exchange in sterling of the association in five bills of two thousand pounds each amounting to ten thousand pounds; and the defendant paid the association for the same the sum of forty-six thousand seven hundred and seventy-seven dollars and seventy-seven cents. Also this defendant stated that, on the first day of July one thousand eight hundred and forty, he had deposited cash with the association amounting to ten thousand dollars (but of this, five thousand dollars was merged in the said purchase of the said exchange) and was induced to loan such ten thousand dollars to the association; and also on the four-

teenth day of July was induced to loan the association ten thousand dollars ; to secure the payment of which twenty thousand dollars the association assigned to the defendant two bonds and mortgages—one for twelve thousand dollars made by John McVicar dated the twenty-third day of October one thousand eight hundred and thirty-eight and one for thirteen thousand dollars made by Thomas Fitch on the twentieth day of September one thousand eight hundred and thirty-eight. Also, that on the second day of January one thousand eight hundred and forty-one he loaned the association three thousand dollars and on the first day of February one thousand eight hundred and forty-one he also loaned the said association another three thousand dollars. That when the association sold him the said five sterling bills (for ten thousand pounds) they delivered to him one hundred of their bonds in favor of Messrs. Curtis, Graham and Blatchford as trustees, each for two hundred and fifty pounds sterling. That the said five bills of exchange were drawn on the firm of Messrs. Palmers, Mackillop, Dent & Co. in England ; and the defendant was informed that if the said five bills were accepted by them, then the said bonds were to be delivered to them. But said bills were dishonored and returned with the bonds to the defendant. That, after such loan and after such return and dishonor of the said bills, to wit, in January or February one thousand eight hundred and forty-one, this defendant was urged to deliver to the said association the said five bills, the said one hundred sterling bonds and the said bonds and mortgages of McVicar and Fitch and to take, by way of security for the indebtedness of the association to him of such amounts of forty-six thousand seven hundred and seventy-seven dollars and seventy-seven cents, ten thousand dollars, ten thousand dollars, three thousand dollars and three thousand dollars certain of the said notes issued under the said trust agreement. That he was reluctant to do this, but was strongly urged ; and relying upon the assurances of the president and the written opinion of counsel of the company that the notes were valid and well secured, he finally consented and gave up all and every the same (including the said two bonds and mortgages) and received the said trust notes, which he then

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held as the only security for the said sums of forty-six thousand seven hundred and seventy-seven dollars and seventy-seven cents, ten thousand dollars, ten thousand dollars, (less the said five thousand dollars merged in the said exchange) three thousand dollars and three thousand dollars.

During the pendency of the suit, the defendant William Vyse died, and his executor, Samuel Clapham, who was made a defendant in his stead, elected to stand on the answer put in by his testator.

The defendant Richard M. Blatchford, receiver of the Commercial Bank, New York, in and by his answer stated that he held thirty-eight of the said notes for one thousand dollars each. That thirteen thousand five hundred dollars were received by the said Commercial Bank as collateral security for thirteen thousand four hundred and seventy-eight dollars and fifty cents loaned by the said bank to the said association upon the said notes or obligations and which was then due. Fifteen thousand dollars of such obligations were received for that amount of money loaned by the bank on the sole security of the said obligations, and that the same was then due and owing. That the said notes or obligations, to the amount of eighteen thousand dollars, were received by the said bank as security for sixteen thousand dollars loaned and the same was due. This defendant insisted that the association was indebted to the full amount of the last mentioned notes. Also he showed that the residue of the said obligations, amounting to thirty-four thousand dollars, were delivered to the said bank as security for a liability assumed by it for the said association, which the defendant did not admit but the same might be established.

There were other defendants also who put in answers.

The case first came before the court on a motion for an injunction against the trustees and for a receiver of the properties in their possession.

Mr. Titus, Mr. Bidwell and Mr. G. Wood, for the complainant.

Mr. Noyes and Mr. Foote, for the trustees.

Mr. Charles Edwards, for the defendant William Vyse.

Mr. *A. Mann*, Jr. for the fund commissioners of Indiana.

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Mr. *B. F. Butler*, for Messrs. Palmers, McKillopp, Dent & Co.

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Mr. *F. B. Cutting*, for Messrs. De Launay & Co.

THE VICE-CHANCELLOR :—The object of the bill in this cause is to set aside a trust deed of assignment, purporting to have been made by or on behalf of the North American Trust and Banking Company, on the 15th December, 1840, to the defendants Yates, Talmage and Noyes, to secure the payment of an issue of eight hundred promissory notes of the company, all of the same date with the deed and payable thirteen months thereafter—four hundred of them being for the sum of \$500 each and the other four hundred for \$1000 each with interest at seven per cent, amounting in the aggregate to six hundred thousand dollars. At the foot of each note is a memorandum in these words : “The payment of this obligation, with others, amounting in the aggregate to \$600,000 is guaranteed by the transfer of securities estimated at \$800,000 under a deed of trust executed between the company and Henry Yates, Thomas G. Talmage and William Curtis Noyes, trustees, bearing even date herewith.”

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The trust deed alluded to is the one in question in this cause.

The bill undertakes to invalidate the deed and the notes connected with it on several grounds ; and it seeks to have the property and securities thereby assigned delivered to the complainant as receiver, appointed by the court of chancery, of all the property and effects of this broken down institution as being part of the assets which should come to his hands ; or if the trust deed shall be deemed valid, then to have the trustee therein named removed and the complainant substituted as trustee under it. And the bill prays an injunction to restrain the trustees from exercising any of the powers which the deed purports to confer upon them.

A motion has been made upon the bill and the answers  
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of several of the defendants for an injunction to that effect and also for the appointment of a receiver to take charge of the property *pendente lite*.

This motion has led to a very full discussion by the able counsel engaged in the cause as well on the part of the complainant and of the trustees as on the part of other defendants who happen to be holders of a large number of the notes provided for and intended to be secured by the trust deed. The argument has embraced all the points which the pleadings are calculated to present when the cause shall be brought to a hearing for a final decree; but it does not follow that a decisive opinion is to be expressed in this stage of the cause upon the rights of all the parties; for, whatever may be the result of a motion of this kind, the general understanding is that it is without prejudice to the ultimate decision to which the court may be called upon to make. Insolvency and danger to the fund pending the litigation with a *prima facie* case and probable cause for sustaining the bill are or ought to be sufficient in the first instance to found an injunction and a receivership upon, without going minutely into the merits. My own observation has taught me to believe that, in general, it is most prudent and best promotes the ends of justice to go no further upon a motion. A decision of the cause is not, therefore, to be expected now. I am only about to look into it for the purpose of seeing whether a proper case for an injunction and a receiver is presented; and although I have to regret the unavoidable delay that has occurred, I am not aware that the pendency of this motion has retarded, as it certainly need not have done, other proceedings in the cause.

The first objection to the validity of the trust deed is that the board of directors, at which a resolution was adopted authorizing the creation of the trust and the execution of the deed, was not a regularly convened board according to the articles and by-laws of the association; and that, therefore, the deed, though bearing the signature of its proper officers, is not binding upon the company. I think this objection is not well founded. There was, in fact, a meeting of the board on the 4th January 1841, when a quorum was present and a resolution to the above effect was adop-

ted. How the meeting was convened and whether held or not in pursuance of the by-laws, as to the time of holding meetings, seems to me not material, so long as the meeting on that day was not objected to by any of the officers or directors then or at any subsequent time. All belonging to the direction have, apparently, acquiesced in the proceedings of that day, since none have been known to protest or object to the authority then conferred upon their officers. I shall, therefore, regard it as the act and deed of the company in its corporate capacity. It is another question, however, how far the company had power by law to issue such notes and to secure the payment thereof by such a transfer of property in trust as the deed contains.

This company or association was organized in July 1838, for the purposes of banking under the general banking law passed in April of that year. Whether such institutions were entitled to assume the character of corporations was a disputed point for some time and in various ways. Our courts at length settled down in the opinion that they were; and they now take rank accordingly. Like corporations, then, they possess all the powers expressly granted to them by the law of their creation, (the general banking law,) and such further powers not expressed as are incidental and necessary to the accomplishment of the business for which they are established. This common law principle, in relation to the powers of all corporations, is embodied in the enactment relative to the powers of these associations. They are declared to have power "to carry on the business of banking." How? "By discounting bills, notes and other evidences of debt—by receiving deposits—by buying and selling gold and silver, bullion, foreign coins and bills of exchange in the manner specified in their articles of association for the purposes authorized by this act—by loaning money on real and personal security—and by exercising such incidental powers as shall be necessary to carry on such business." Here the business of banking is authorized; and in what that business shall consist, is defined. Their powers are co-extensive with and equal to the transaction of this business in all its branches. If not by express

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enumeration of the powers, at least by necessary implication.

The manner of exercising one of their powers or rather of carrying on or conducting one branch of their authorized business—that of buying and selling the precious metals, coins and bills of exchange, appears to be left, in some measure, to the discretion of the associates, as the same shall be regulated and prescribed by their articles of association, yet in the articles of association of this company we find no such thing specified.

Among the powers confided to the board of directors for carrying on the banking business, is enumerated the “buying and selling gold and silver bullion, foreign coins and bills of exchange, in such manner as they may see fit for any purpose not prohibited by law :” (Art. IV. sec. 3.) This seems not to be such a specification of the manner of doing that business, as the law intended, and it may perhaps give rise to the question whether the directors could lawfully enter upon the transaction of that branch of business at all unless the way, mode or manner of conducting it, (whether on credit or always for cash—whether with money to be borrowed for the purpose, or by appropriating a part of the capital paid in to that subject and to be kept employed therein,) was specified in the articles of association for their government. Still, I shall consider, for the purposes of this discussion, that the articles of association are sufficiently specific to give the directors power to conduct that branch of business as well as others. The other powers confided to the board of directors by the articles of association, so far as relates to the business of banking, are the same as those conferred by the law on the association itself—with some little addition or amplification—thus, to the power of receiving deposits is added “on interest or otherwise,” and they may give to depositors “such receipts, bonds, bills or other evidences of debt as may be lawful.”

From the course of dealing in which this company engaged and the disastrous results to which it led, it becomes somewhat important to consider, how far or for what purposes the company as a banking institution could lawfully borrow money? There is no express recognition of the

power to borrow in the general banking law, nor are there any words of prohibition. If the power exists, it is by implication or as incidental to other powers expressly granted. "Receiving deposits," as understood in the practice of banking, is different from borrowing money in the ordinary acceptation of that term, and agreeing to allow interest on monies deposited with a bank and giving notes or certificates or any other evidences of debt therefor does not constitute the doing so an act of borrowing, hence the power of receiving deposits does not necessarily include the power of borrowing.

But the power to borrow may be incidental to the power of "discounting notes"; and why may not a banking association, as well as an individual banker, borrow money to be employed in that branch of business? I am at a loss to discover any good reason why they may not have the right to borrow for that purpose, if the state of their business, or the interest of the concern, shall justify it. Borrowing may be, and I think is, incidental also to the power of buying bills of exchange, bullion and foreign coin. These they may sell as well as purchase, and, in this unrestricted traffic, occasion may frequently arise for money to meet their engagements or to create funds abroad on which to place bills drawn by them for sale. The power of borrowing money may be called into exercise, likewise, for the purpose of buying or procuring state stocks and other securities to be deposited with the comptroller, though it certainly would be more consistent and compatible with the idea of a banking institution that it should be a lender at all times and never a borrower.

In throwing open the business of banking to individuals and to associations, the legislature, doubtless, supposed that actual capital would be honestly and fairly contributed by the individual stockholders, and not that the association, in its corporate capacity, should proceed upon the credit of a fictitious capital to borrow money or other means with which to commence or to carry on their business. Still, there is nothing in the terms of the original law directly prohibiting them; and it is now only by the amendatory act of May 14, 1840, that they cannot commence business until \$100,000

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of securities, at least, are deposited with the comptroller. These securities may yet be obtained by borrowed means.

While, therefore, we must concede to banking associations the power of borrowing money and of course to secure the repayment of it, by a pledge or transfer of property, if necessary, yet borrowing must be confined to the legitimate business of banking, and the necessity for it must proceed from that source. In other words, the money borrowed must be applied to some one or more of the purposes of their institution or creation as recognized in the law. Thus, they can have no right or power to borrow money or contract for loans to enable them to engage in speculations, or in mercantile or other business having no sort of relation to and forming no part of the ordinary business of a bank. Suppose they should buy cotton or other produce of the country and send it abroad, or should purchase ships and employ them in distant voyages with the view of placing cargoes in the hands of consignees, on the credit of which they might be enabled to draw bills of exchange, and should do this, under the pretence of exercising their corporate right of selling bills of exchange—would debts contracted in such a course of business and attempted to be secured by a pledge or hypothecation of the property contributed by stockholders be tolerated? I apprehend not. They could not be regarded as debts binding on the association, because not contracted for the purpose of the business confided to the directors. The unauthorized acts of agents are not binding on their principals; and directors are but agents or ministers, entrusted with powers to be exercised for the benefit of others. Those who have contributed to the formation of a banking capital by becoming shareholders; those who have entrusted their money on deposit, or have otherwise fairly become creditors of a bank, are entitled to protection against any unauthorized assumption of powers by the directors or any misapplication of the assets or funds of the institution. Its property cannot be diverted to other purposes or be used up in speculations foreign to the business of banking without a struggle for its recovery and an effort to reclaim it. A rigid adherence to this principle works no injustice, although it may sometimes produce a seeming hardship. Persons dealing with corpo-

rations or associations of limited capacity, must look to the character of the transactions they engage in with them. The law under which they act and the business they are authorized to perform is all written in the public statute book, with which every man is supposed to be acquainted.

He who shall neglect to inform himself, can hardly have a valid excuse for being misled where every thing is open to inquiry. Still, there may be cases where a man may be innocently drawn in to lend his money, or part with his property, upon the strength of some supposed security or obligation which a company has issued, having the semblance of such as the company might lawfully issue and bearing upon its face no mark of legal condemnation or excess of authority. He may, in that way, become and claim to stand as a *bona fide* creditor, having had no reason to suspect that the money he furnished was wanted for any unauthorized purpose, or was to be applied to any other than the legitimate business of banking, and then, upon the doctrine favoring innocent *bona fide* purchasers without notice, be allowed to stand as a creditor to be paid out of the assets of the bank. The opinions delivered upon the final decision of *Safford v. Wyckoff*, 4 Hill's R. 442, shows the principle on which the holder of negotiable paper, issued by a banking association, may sustain an action and recover against them. Whether the holders of any of the 800 promissory notes in question can bring themselves within the principle above alluded to, may be a subject of consideration hereafter.

I have, now, to inquire whether the company could lawfully issue this mass of notes? The effect to be given to them in the hands of third persons, claiming to be innocent holders for value, is a different question.

I do not understand it to be claimed for these notes, that they were issued upon the basis of actual deposits with the company or for actual loans of money to be used in either of the specified branches of banking business. A very different purpose seems to have been contemplated. The pecuniary affairs of the company had become greatly embarrassed, owing to very extensive operations of a speculative character in state stocks, in which the company had been engaged. These stocks had greatly depreciated, as had also

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all other securities, such as bonds and mortgages which the company held. In the early part of the year 1840, the company had obtained all that could be raised upon a pledge of the stocks and by various other expedients to which they had resorted. At the close of that year and in the beginning of 1841, (a memorable period,) the political horizon was lighted up with rays of hope, to many, of better prospects for the country and a brighter era in finance. The company, therefore, determined to make a further effort to avert, if possible, impending ruin and insolvency, by raising funds upon the issue of their notes or obligations to be secured by a pledge or assignment in trust of their remaining assets, consisting of various securities. The idea of getting up a subscription by individuals to advance money upon the notes or obligations of the company was suggested, and a paper to that effect, dated the 15th December, 1840, was signed by eight or nine of the directors, agreeing to take certain amounts set opposite their names in the obligations of the company and to pay cash therefor in monthly instalments, not exceeding ten per cent., commencing on the 1st day of January 1841, the payment of the obligations to be secured by a transfer in trust of assets belonging to the company; but this subscription was not to be binding unless \$400,000 should be subscribed. Only \$245,000 was subscribed, and that paper seems not to have been further regarded, except as furnishing encouragement that loans upon this plan could be obtained. The effort was accordingly continued, and at the meeting of the board on the 4th day of January 1841, the chairman of the finance committee stated the necessity of creating a trust of \$800,000, "for the purpose of providing funds for meeting the accruing payments of the company during the then next twelve months," by an issue of notes to the amount of \$600,000, payable in thirteen months from the 15th December preceding. The measure was, therefore, resolved upon. There is much in the answer of the trustees explanatory of the motives of the directors in resorting to this expedient. They honestly believed it would furnish the means of enabling them to sustain the credit of the company and prolong its existence. They hoped to induce some of the creditors to accept notes thus secured for their

demands as collateral, and give time ; and to obtain advances of money on other portions of the notes. There would appear to be nothing wrong in all this, provided the demands of existing creditors, which they wished to meet, had grown out of legitimate banking business, and provided the money expected to be raised was necessary, and was intended to be applied to the discharge of actual bona fide debts of that character.

Upon this point, there is very considerable difficulty in the case. I have shown the propriety of discriminating as to the character and consideration of the debts which had been contracted in the name of the company, and I apprehend it will be necessary to go into that investigation before the just and equitable rights of creditors and stockholders of this banking association on the one hand, and the holders of these eight hundred notes on the other, can be determined. As the case now stands upon the pleadings, that discrimination cannot be made ; proofs will have to be gone into or inquiries instituted on the subject in a master's office. In the mean time, I think it is incumbent on the court to interfere. The propriety of applying the assigned assets of the company to the payment of the notes indiscriminately according to the trust deed, is too doubtful to be allowed at present, and must, therefore, be prevented.

An additional reason exists for placing the trustees under restraint. In issuing the notes in question, many of them were placed in the hands of persons as mere agents, who have made either none or but partial returns for them. Other notes and to large amounts have been handed over as collateral security for demands against the company of far less amount than their face, and yet the trustees, according to the express terms of the trust, and the covenant they have entered into, might not feel themselves at liberty to withhold payment from any person presenting one or more of the notes, however injuriously such payments might affect other rightful creditors.

There are other objections interposed on the ground of the illegality of the transaction, which it may be worth while to consider. It is contended that even if the company had the power to borrow money and supposing the

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money thus raised to have been used or applied in the course of a legitimate banking business, still that they had no right to borrow upon the issue of notes in the manner and form in which these were made and issued; that the general restraining law forbade such an emission and that the act of 14th May 1840, is also against it.

The answer denies any intention to evade or violate the laws of the state, and shows that the directors acted upon the opinions of counsel that they might lawfully issue the notes and secure the payment by an assignment in trust. It is, likewise, shown that the notes did not, upon their face or in appearance, resemble ordinary bank notes, that they were not from engraved plates, but in ordinary typography, and it is denied that they were issued for circulation as money within the meaning of the prohibitory laws. Still, if the transaction was such as any law of the state has forbidden, honest intention and good faith in the belief of its lawfulness on the part of the directors will not uphold it. The transaction must be judged of according to the spirit and intention of the law and not solely by the motives which may have induced it.

The original restraining act incorporated into the revision of 1830, (1 R. S. 712,) is still in force; and, for aught I see, is applicable to all banking associations and individual bankers, except so far as it is modified by the provisions of the general banking law allowing the issue of bills for circulation as money countersigned by the comptroller. One of the offences against the franchise of banking, meant to be guarded against by that statute, is the issuing of notes or other evidences of debt by individuals or associations or bodies corporate, "to be loaned or put in circulation as money," without the express authority of law. It is not the mere issue of notes, therefore, that is prohibited; for individuals or corporations may issue any number that their convenience or lawful business may require, but it is the issue to be loaned out as money or to be put in circulation as such, so as to form a part of the circulating medium like bank notes, that the statute has prohibited as mischievous.

To constitute the offence, it is not necessary they should

be on fine paper from engraved plates and ornamented with vignettes and devices symbolical of the bank. The style in which they are got up may be an evidence of the design with which they are issued and to give them a more ready circulation like bank notes; and that inference was drawn by the chancellor, in the case of the engraved notes of the Life and Fire Insurance Co.: *Attorney General v. Life and Fire Insurance Co.*, 9 Paige, 470. But this inference may be drawn from other facts and circumstances and be just as conclusive. Thus, with the eight hundred notes in question, they were uniformly printed and issued in a regular series, in sums corresponding with the larger denomination of bank notes, all payable at the same time, to the order of a clerk in the employ of the company, who endorsed them, not for the purpose of adding any thing to their security, but to give them currency without further trouble, in the same manner as bills payable on time to bearer. This, at least, shows they were adapted to the purposes of circulation and, purporting to be issued by a banking association, is an additional circumstance calculated to give them currency as money, like the post notes of the Life and Fire Insurance Co., which the chancellor held to be within the restraining act and void.

There are other and to my mind stronger reasons for imputing to the issue in question the character of circulating notes within the prohibition of the statute, notwithstanding the denials of the Answer. The avowed object was to raise money upon the strength of the notes secured by the trust. The securities placed in trust were not such as they could get countersigned notes for, from the comptroller, in sufficient amount or it is to be presumed they would have resorted to that mode of obtaining the desired relief. Hence they resorted to the other. The analogy is striking. Instead of a trust which the banking law authorized, they undertake to create one of their own. Instead of the comptroller for trustee and a pledge or deposit with him, they appoint other trustees and transfer such securities as they deem proper. Instead of notes payable on demand, they make them payable on time, and they are delivered out, not to persons lending or advancing money upon them, un-

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der an agreement to hold the notes till maturity, but to directors and agents, willing to take charge of certain amounts and parcels of the notes, upon an understanding that they are afterwards, from time to time, to bring in money for the notes as they may be able to raise it. The persons to whom the notes are entrusted could accomplish this agency only by putting the notes in circulation, in the same manner that countersigned notes could be used for the like purpose.

Though the officers and directors of the company may say they did not, thereby, intend to give to the issue the effect of circulating notes, they are still chargeable with the mischief and the consequences which might naturally ensue from the act of giving out such paper, if they did not, at the same time, as I think they were bound to do, guard against the possibility of an abuse of the law, by limiting the negotiability or circulation to persons who might be found willing to lend money upon the security or to persons who might agree to take them for debts which they already held against the company and who could only part with the notes by further endorsement or assignment and not by mere delivery. The precaution of a special endorsement under an agreement to hold and not to put in circulation, would have taken from the notes the capability which they were otherwise calculated to have of becoming a part of the circulating medium and of inflating, to some, extent the currency of the country, which it had wisely become the policy of the government to prevent. If the intrinsic value of the property, which the company proposed to pledge, was such as to entitle them to credit and to confidence in respect to the loan which they wished to effect, they might have attained the end by making their notes or bonds payable directly to the lenders for the sums advanced or to be advanced by each, transferring the collaterals at the same time for security; and so, for the purpose of procuring an extension of credit where necessary, they might have sought out their creditors and proposed a renewal of previous notes or bonds becoming due upon the like arrangement; and in that way have avoided all legal objections to the means of

accomplishing these objects, at least so far as the restraining act might be thought to interfere.

I have, thus far, considered the issue of the eight hundred notes as within the mischief which it was the policy and intention of the general restraining act to prevent. And if I am correct in these views of the transaction, it is almost needless to say that it is within the prohibition also of the 4th section of the act of May 14, 1840, amendatory of the general banking law. Perhaps the legislature, in adopting this 4th section, did not intend to go further in respect to the character and object of the issue or circulation which they thereby meant to forbid than the previously existing restraining law had done, that is, to check the issue or circulation of post notes or bills as money; but there can be no doubt, from the strong and decisive tone of the section, that the legislature intended to go as far and prevent at least the issue of such bills or notes as were evidently designed or adapted to circulate as money and, more effectually to put a stop to the practice, on the part of any banking association or individual banker, they declare any violation of this section shall be adjudged a misdemeanor punishable by fine and imprisonment, while, for a violation of the original restraining act, a penalty or forfeiture of one thousand dollars alone is imposed. The conclusion, that the issue of the eight hundred notes was illegal, being not only unauthorized by the general banking law, looking to the purposes for which they were issued, but expressly prohibited as contrary to the policy of the laws regulating the banking system of this state, leaves nothing for the trust deed or the trust vested in the defendants Messrs. Yates, Talmage and Noyes to rest upon.

The notes must be deemed void and the assignment in trust will have to be set aside for that reason, irrespective of other objections and considerations which have been urged against it—such as that it was made in contemplation of the insolvency of the company and, in that event, was to give an undue preference to one class of creditors over others; that it was made to hinder and delay the general creditors, and therefore fraudulent in law; and that it was not made to secure existing debts, but prospective and contingent liabilities,

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contingent in point of amount, and, therefore, not to be sustained against prior creditors. These are objections which possibly may be effectual against the deed or assignment, though the notes themselves should be found to be valid and binding upon the company; but it is unnecessary to go into a discussion of them at present. Enough appears in the views I have thus far taken of the case to satisfy me that the trustees ought not and cannot, with propriety and with due regard to the rights of general creditors and stockholders, be allowed to hold and dispose of the property and assets assigned to them, pursuant to the trust.

In saying this, I do not wish to be understood as expressing an opinion, much less as deciding that none of the holders of the hundred notes can claim or be allowed to stand as creditors of the company by virtue of them. It may be that, as *bona fide* holders for value, without notice, actual or constructive, of any thing affecting the validity of the notes, they may be permitted to occupy the place of honest creditors in the closing scenes of this great financial drama. Some of the parties to this suit are understood to have been creditors of the company before and at the time of the emission of the notes. Perhaps they will be able to show that they became such creditors while dealing with the company in the way of legitimate banking business; and that they accepted some of the notes, supposing them to be valid, on account of such previous indebtedness. There will be no difficulty, I apprehend, in such cases in considering such parties creditors still, upon the original footing of their debts. Other creditors, it is said, were induced to accept some of the notes upon the strength of the trust with which they appeared to be connected and to relinquish other securities held by them at the time. In such cases also there may be no difficulty with a court of equity in remitting the party to his original rights and securities, provided he shows his debt to have been a fair one and contracted within the scope of the lawful authority of the officers and directors of the company. These, however, are reserved questions not necessary or proper now to be passed upon. It will be in time to do that when all the facts and circumstances of each transaction shall be presented. In

the meantime, the injunction prayed for must issue and the assigned property be secured in the hands of competent persons as receivers.

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After the appointment of a special receiver, an immense mass of testimony was taken. The abstract of the pleadings, before set forth, however, when taken in connection with the facts contained in the opinion of the Vice-Chancellor, will be enough for the present report on the merits. Nov. 6, 7, 11, 12, 13, 18, 19, 20, 21; Dec. 1, 2.

The cause was now heard on pleadings and proofs.

Mr. *George Wood*, Mr. *Bidwell* and Mr. *Titus* appeared for the complainant.

Mr. *C. C. King*, Mr. *O'Connor* and Mr. *B. F. Butler*, for the defendants *Palmers*, *Mackillop*, *Dent & Co.*

Mr. *W. C. Noyes* and Mr. *Marvin* for the trustees.

Mr. *E. H. Blatchford*, for the receiver of the Commercial Bank and the Bank of the United States and the Girard Bank.

Mr. *F. B. Cutting*, for the defendants *De Launay & Co.*

Mr. *Charles Edwards*, for Samuel Clapham, the executor of William Vyse.

Mr. *Albon Man*, for the defendant *Ezra Clark*.

THE VICE-CHANCELLOR:—In granting the motion made in the early stage of this cause for an injunction and a receiver upon the bill and answers, I had occasion to express an opinion unfavorable to the validity of the trust deed of the 15th of December, 1840, and to the legality of the eight hundred promissory notes purporting to be notes of the "North American Trust and Banking Company," and which the deed was intended to secure, as being an emission of bills of credit or notes not authorized by law. Sept. 22, 1846.

The same questions then considered, have again been

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argued before me, but more *in extenso* upon the pleadings and voluminous proofs in the cause, with a view to a final decree which shall determine whether the complainant, as the receiver of the property and effects generally of this insolvent banking institution, is entitled to have the property, covered by the trust deed in question, placed in his hands as a part of the assets of the association, to be administered for the benefit of the legitimate creditors and stockholders, or whether the property shall remain with Messrs. Yates, Talmage and Noyes as trustees under the deed, for the purpose of being applied by them to the payment of the notes according to the trusts thereby declared: and if the deed is held to be void, then the other defendants, who are brought in as holders of many of the notes, (and some of them to a large amount,) present this further question, whether they are not, still, to be regarded as creditors of the banking association, with equitable liens upon the assigned property, and thereby entitled to a preference of payment over other creditors: and with regard to some of the defendants, this still further question, whether they are not entitled to be restored to the benefit of securities and money and other things of value parted with when they received the notes relying upon their validity and the good faith of the trust as a security?

In considering this case, the first objection to be noticed is an objection *in limine* to the complainants' right to draw in question the validity of the trust deed and the authority of the banking association to issue the notes—for it is said the complainant is here in a representative capacity merely—that he stands in the place of the defunct banking company, and has no better or other rights than it would have, were it a complainant. This is true. And then again it is further said, that inasmuch as the company could not be allowed to repudiate its own acts and deeds, so this receiver cannot. This, likewise, is true of acts done by the company in its corporate capacity through its proper officers or managers, in a matter of business or contract authorized by law, to be entered into and performed—but it cannot be true of acts done by the officers, managers or agents under an authority assumed and not really possessed, and in a matter

of business not within the reach of the powers and authority conferred by law on the body corporate itself.

And again—the stockholders of this company being the corporators, and they having selected the officers to manage its affairs, if these officers have gone on, step by step, transcending their legal powers and authority, with the knowledge of the stockholders, they making no objection, nor taking any measures to stop such proceedings, their acquiescence will be presumed, and this be deemed a ratification on their part, so that it may also be true, as far as the rights and interests of stockholders alone are concerned, that the receiver will not be permitted to call these acts in question. But the receiver is not here as the mere representative of stockholders. It is in proof that there are creditors whose debts do not appear to be in any way provided for, and the rule as applicable to stockholders arising from their acquiescence in illegal transactions (if such there be) would not apply to innocent creditors, who could take no part in the management of the affairs of the company. It is competent, therefore, and Mr. Leavitt is at liberty to insist, that the deed in question, though executed by the proper officers of the company pursuant to a resolution of the board of directors, and with all the ceremony and formality of an act intended to be valid and binding, was, nevertheless, in its character a forbidden and unauthorized act, such as could only be done under an assumed or merely imaginary authority of law—and that the transaction which led to the making of the deed, as well as the deed itself and the notes and the trust to secure their payment, are all void. This brings me, then, directly to the question, are these acts void or are they valid in law? It can no longer admit of a question, and the point must now be regarded as definitely settled by the repeated decisions of the Chancellor and of the court for the correction of errors, that the banking institutions of this state, duly organized in conformity with the provisions of the act, passed the 18th of April, 1838, to authorize the business of banking, are corporations—and that the law creating them is a constitutional law, although not passed by a vote of two-thirds of the members elected to the legislature—the judgment of the supreme court in *De Bow v. The People*, 1

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Denio's Rep. 1,(a) to the contrary notwithstanding. They are not only corporations but they are "monied corporations" within the definition of that term in the revised statutes. As corporations, then, they can only have and exercise such powers as legitimately belong to them—that is to say, such as are expressly conferred by the general banking law and by some general provisions of the revised statutes and such as they take by necessary implication as incident to the powers expressly granted. At the same time, they are subject to such prohibition, regulations and restrictions as the revised statutes and other acts of the legislature have prescribed with respect to the business of banking.

My views on the subject of banking powers and banking business, as authorized to be conducted by associations and individuals professing to act under the restraints of law, (restraints imposed by a wise policy rendering the pursuit of such business a matter of franchise or privilege granted by the state,) and for what purposes, in the course of such business, they may lawfully borrow money and contract debts, were given in the opinion delivered by me on the motion before mentioned. I find no reason for changing the views I then expressed, and it is unnecessary to repeat them here. Looking to the law, as the only authority and guide in such matters, and I cannot but think that the officers and managers of this company transcended their powers as a corporation and departed widely from the legitimate business of a banking company when they went (extensively as they did,) into the buying and selling of state stocks and bonds.

The right of banking companies to purchase state stocks should be allowed to exist only when the object is a deposit or pledge of the same for circulating notes, or, if for any other purpose, it should be the investment of capital or surplus funds for the sake of interest. Now, the North American Trust and Banking Company had no capital or other funds on hand requiring to be thus invested. They bought the whole of that large amount of state stocks entirely upon credit, issuing their own paper in the shape of certificates of

(a) This case is now expressly overruled by *Gifford v. Livingston*, 2 Denio, 380.

deposit or of bonds or promissory notes in payment; and, in one instance at least, accompanied by the personal guarantee of some of the directors. The company never had any cash capital paid in beyond a comparatively few thousand dollars. The capital contributed by subscribers to its stock was in bonds and mortgages, exceeding in nominal amount three millions of dollars. These bonds and mortgages were, in effect, investments already made of the capital, so that nothing remained to be invested in any other description of securities. True, the company had taken measures to obtain a large subscription of cash capital in Europe, and its officers were led to believe they could obtain it. In that expectation they were disappointed—but, upon the strength of it they purchased, in August, 1838, immediately after the organization of the company, one million of dollars in amount of the public debt of the state of Arkansas. This purchase, though made upon credit in anticipation of a cash capital, may be justified as being within the authority of the officers and directors, since it appears to have been made with a view of using the bonds with the comptroller, as a basis for circulating notes to be issued by the company. It appears further, however, that only one-fifth of the amount (\$200,000,) was ever deposited with the comptroller. Being disappointed in obtaining a cash subscription to the capital abroad, the residue of the Arkansas bonds were diverted from the original purpose of the purchase and converted into a means of borrowing money. Had they rested here, relying upon the bonds and mortgages as constituting their capital, the company might possibly have succeeded, notwithstanding the million of debt they had contracted at the outset; but the views of the officers and managers were otherwise. In 1839 they proceeded to increase their debt enormously by the purchase of other state stocks, solely upon credit. One million two hundred thousand of Indiana bonds were bought, eight hundred thousand of Ohio securities, two hundred and fifty thousand of Florida bonds, and some hundreds of thousands of other descriptions of stocks and securities. None of these large amounts were obtained with any design or intention of being deposited with the comptroller for circulating notes. The contrary very clearly

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appears from the testimony. The object was a speculation. The stocks were to be sold again in expectation of profits. It became a traffic in stocks, and, for that purpose, by far the largest portion were sent to Europe, and, until sales could be effected, they were to serve the purposes of a credit on which to obtain advances or loans through the medium of bills of exchange. Twice an agent was sent out by the company to aid in expediting sales and to attend to the financial operations generally in which the company was engaged.

There were other extensive operations of the company, which seem to me not to have been within the pale of legitimate banking business. I allude to the purchase of half a million of southern funds, as they were called, being the paper of southern and western banks, bought by the company at a very considerable discount, because of the suspension there of specie payments, and intended to be re-sold at an expected profit or to be laid out in the purchase of cotton at the south to be shipped to Europe. These funds were bought on credit, and not for the purpose of investing capital or any money which the company had on hand. A portion of these funds were hypothecated and ultimately sold; and a portion were used in the purchase of cotton shipped to Europe and there sold. By the testimony it appears that the loss sustained in this business was upwards of two hundred thousand dollars; on the sales of the cotton alone the loss was ninety thousand dollars.

Another instance of unauthorized dealing, as it appears to me, considering the circumstances of the company, may be found in the buying up of some five or six thousand shares of its own capital stock for the purpose of being sold out again and, in the mean time, of being used as a means of raising money. These shares were paid for with the proceeds of bills of exchange procured to be drawn for the benefit and on account of the company, to the amount of £46,875 sterling. This transaction, like those preceding it, resulted in a considerable loss.

Various other transactions were resorted to on behalf of the company, as expedients for raising money or of placing, at the disposal of its officers, the "ways and means" of obtaining a credit. These were calculated to afford tempora-

ry relief, but they were generally such as, in the end, involved the company deeper and deeper in ruinous consequences.

The embarrassments of the company were partly owing to the want of a cash capital to begin with, but the principal cause of the difficulty in their affairs was the purchase of the large amount of state stocks, especially the one million two hundred thousand dollars of Indiana. This purchase appears to have laid the foundation of all the subsequent misfortunes of the company. The necessity of raising money to meet the payments for this large purchase, as well as of the first million purchase of Arkansas, created the necessity of resorting to the purchase of other large amounts of the same description of property, in order to place the company in possession of the means of raising money in the shape of advances or loans.

The necessity of resorting to such an expedient at one time, produced the necessity of a similar resort at another. Periods of great embarrassment followed each other in rapid succession. The stocks became more and more depreciated and the difficulty of obtaining advances adequate to their wants constantly increased; and, finally, the sales, when made, produced a loss to the company of somewhere from twenty-five to thirty per cent. on the cost. When, therefore, such operations, as I have alluded to, were found to be fallacious or were no longer available as "monied means," other expedients were resorted to. We accordingly find the directors and officers of the company engaged in issuing, from time to time, large amounts of certificates of deposit, sterling bonds and promissory notes, based upon assignments of bonds and mortgages, in trust for the purpose of securing the payment of such issues of paper. Hence, we hear of the "Million Trust," as it is called, and the "First Half Million Trust," and the "Second Half Million Trust," and other trusts of similar character, besides the Yates, Talmage and Noyes trust, the subject of the present suit.

This last trust was authorized by a resolution of the board of directors, of the 4th of January, 1841, though the deed and the notes bear date the 15th December, 1840. The finance committee had stated the necessity of creating this trust, as

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a means of providing funds to meet the accruing payments of the company during the then next twelve months, and that they had already made the arrangement for the transfer of securities to the amount of \$800,000, and for the issue of notes to the amount of \$600,000; and, therefore, requested the authority of the board to carry it into effect. There had been a report made a short time before, by a special committee appointed to examine into the affairs of the company, showing its crippled condition and recommending the adoption of prompt and efficient measures to restore its credit and to render available its existing assets; the committee expressing their belief that, by judicious management, confidence might be restored and the advantages expected from the formation of the company at the commencement might still be realized. Hence it was that the proposition to create the trust in question was adopted. The object was to raise money by making and disposing of this large batch of notes, purporting to be thus secured. A similar undertaking had been started by an agreement drawn up on the 15th December, 1840, and signed by a number of the officers and directors, agreeing to take certain amounts, set opposite to their names, in the obligations of the company, payable in twelve months, with interest, and to pay the cash therefor in monthly instalments of ten per cent.; such obligations being secured in like manner by a transfer in trust of assets belonging to the company; but it was provided their subscriptions should not be binding until the amount of four hundred thousand dollars was subscribed. Subscriptions to that amount were not obtained, and the plan was consequently abandoned. The notes under the trust deed, as authorized by the resolution of the board on the 4th of January, 1841, were, therefore, made without reference to any such previous agreement of the directors or other persons to take them and to furnish money upon loan or otherwise for the use of the company. The notes were rather intended, as it would seem, to be given out to the directors and any other persons who might be willing to aid the company by taking the notes in large or small amounts, either upon purchase or by loans of cash on the security of them or to be used in the best practical manner towards relieving the pressing necessities of the com-

pany. It was, likewise, contemplated that the holders of previously issued bonds, notes and certificates of deposit, about maturing, might be induced to take some of this issue of notes in payment, exchange or renewal—such previous liabilities having been contracted originally in the purchase of the state stocks and in other business transactions before alluded to. The notes were used to a considerable extent for all these purposes, as I shall have occasion more particularly to notice.

The question at present is in respect to the entire mass of these notes, whether they are such as this banking company could lawfully issue?

The objection against issuing them is, that not being based upon the pledge of securities with the comptroller, nor intended to be countersigned and registered as required by the banking law, it was an unlawful emission, such as is forbidden both by the general restraining law incorporated into the revised statutes, (1 R. S. 712, first edition, sec. 3 to 6,) and more particularly by the 4th section of the act passed May 14th, 1840, amendatory of the banking law under which this company was formed. This objection came under consideration in deciding the motion to which I have before alluded; and my opinion was then expressed pretty fully upon the illegality of the issue of these notes. Subsequent examination and reflection have strengthened my conviction on the subject: for I have discovered nothing in the proofs or in the circumstances given in evidence to take the case out of the operation of the statutes referred to. A decision of the supreme court of this state in May term, 1846, in a case of *Swift et al. v. J. D. Beers*, strongly corroborates my opinion. There, an action was brought upon Mr. Beers' guaranty of a note of the North American Trust and Banking Company, made payable sixty days after date, with interest, and the illegality of the note under the 4th section of the act of May 14th, 1840, was set up as a defence, which section forbids the issue of any bill or note by a banking association unless made payable on demand and without interest. That court held it to be a fatal objection to the note that it was payable on time, with interest, and immediately, on the close of the argument, gave judgment for the defendant.

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The eight hundred notes in question are all of that character, being drawn payable thirteen months after date, and with interest at seven per cent.

The notes being utterly void, the accompanying assignment, creating a trust for the security and payment of the notes, has no legal effect and is of no avail to the parties claiming an interest under it. This is of itself a sufficient ground for declaring the assignment void and for breaking up the trust; it is, therefore, unnecessary to say much with respect to other legal objections that have been urged—one is, that the assignment was made when the company was insolvent or, if not insolvent, at least in contemplation of its insolvency, within the prohibition of the revised statutes: 1 R. S., first ed. 591, § 9.

A question has been made, whether the revised statutes, on the subject of preventing the insolvency of monied corporations and to secure the rights of their creditors and stockholders, apply to the banking institutions formed under the subsequent law of 1838? But so long as they are to be regarded as "monied corporations," (and, under the treatment they have received from the courts, they must be so regarded,) I see no good reason why that provision of the revised statutes should not be applied to them. That this banking company was in a state of insolvency at the close of the year 1840 is now manifest. Its failure in the course of the summer 1841 was owing, not to any fresh misfortunes it met with, but to the losses it had sustained in 1839 and 1840. The officers and directors may have believed, from the report of their committee of investigation and from the proposed plan of creating another trust in addition to those previously created, that they would be able to sustain the credit of the company, but this did not alter the fact of its having become bankrupt already. The issue of the notes based upon this trust was but another struggle, a last effort to resuscitate a dying institution; the effort failed and the institution sunk under the weight of accumulated liabilities. Those liabilities, for the present purpose, must be considered as debts. It is in vain, then, for those who had the management, to say they did not contemplate such an event, and that, instead of a failure, they looked forward to

a restoration of the institution to public confidence and credit. Grant them this—admit they had faith in their efforts as the means of raising money and of satisfying the creditors and of averting the impending catastrophe, and it only obviates the objection so far as to show that it was done “in contemplation of insolvency,” leaving the objection to stand solely upon the ground of the actual insolvent condition of the company at the time, and, therefore, equally within the prohibition of the statute.

Another objection is, that the trust assignment is fraudulent in law, in respect to the rights and remedies of existing creditors, having the effect to hinder and delay them in the collection of their lawful demands, a large amount of property being thereby tied up and placed beyond their reach.

When it is considered that the design was to place eight hundred thousand dollars worth of assets belonging to the company in the hands of third persons, not for the purpose directly and immediately of paying debts previously contracted and becoming due daily through the year 1841, but for the purpose of securing future liabilities then about to be contracted and payable only at the expiration of thirteen months from the date: I confess that it presents to my mind very much the appearance of a transaction which the law cannot fail to condemn as an obstacle and hinderance to the just rights of existing creditors. During the thirteen months the assigned property is locked up by the trust. It may not all be required for the purposes to which it is thereby appropriated. The whole of the notes may not be used and loans and advances to a limited extent only may be obtained upon them, and yet the property assigned is to remain wholly and entirely devoted to the trust until the expiration of the thirteen months at least. Besides, according to the estimated value of the assigned property, it exceeds the amount of the notes some two hundred thousand dollars. This large surplus placed under the trust, may be regarded as still further evidence of a fraudulent intent towards the general creditors in respect to the hinderance and delay it might occasion to them. But I forbear to pursue this topic, for it is unnecessary. If I should erroneously ascribe to the assignment and transfer the character of a

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fraudulent conveyance, there must still be a decree against it, according to my judgment, on one or more of the other grounds that have been taken.

Although this disposes of the question touching the invalidity of the trust deed of assignment and of the notes, there are other important questions to be considered in regard to the holders of some of the notes, as to what are their rights upon the court pronouncing them void in their hands. They have been made defendants to the suit in order that these questions may be determined between them and the complainant as receiver. The effect of setting aside the trust deed and of decreeing a surrender of the trust property to the complainant, is to deprive all the holders of the eight hundred promissory notes, (notwithstanding they may have given value for them) of any right to stand as *cestui que trusts*, and in that capacity to claim an interest in or any benefit from the assigned property.

But it is contended that they are nevertheless to be regarded as equitable mortgagees of the property or as having liens in equity, which this court will enforce, though the property should pass into the hands of the receiver.

This claim to a protective equity is placed, in the first instance, upon the ground of their having made loans or advances of money or assumed liabilities for the company, on the strength of the trust and in faith of the security it was intended to afford. But to allow the claim in this light would be virtually to restore the trust and to give them the benefit of it by another name. It would be merely converting the receiver into a trustee for their benefit, in the place of the trustees under the deed of assignment. I cannot believe that the doctrine of equitable mortgages is to be applied so as to produce such a result. It cannot be that what the court is called upon by law to demolish with one hand, it is to reconstruct and uphold and give effect to under another form, with the other hand.

If any one or more of the persons, who have dealt with the company on the credit of the trust, have a right to follow the property into the hands of the receiver, charged with an equity in their favor, it must be a particular equity growing out of and dependent upon the circumstances of

each individual transaction, and not by virtue of a general equity which would apply to all and be equally available to all the holders of the notes who could show they had paid value for them. Such an equity, it seems to me, cannot arise from a loan or advance of money to the company, nor from endorsements or other liabilities assumed for it, which the party may have since paid or become bound to pay, even though made or assumed upon the faith of notes received at the time and believed to be notes valid in law and properly secured by the trust deed which afterwards turn out to have been invalid. Such failure of the security ought to have been foreseen. They who dealt with the company, on the footing of such security, took the risk of its failing them. Possibly, they may still be allowed to stand as creditors of the company. I am not going to say they are not—but if creditors, they are creditors at large, without any other security than what the insolvent condition of the institution may afford to all of them alike. The fact that the security they dealt upon has disappeared, has only placed them where other creditors stand and furnishes no reason why this court should undertake to create for them a new sort of security beyond what they were content to rely upon at the time. If the parties on lending their money or their credit to the company had, besides taking the notes, stipulated for a pledge or hypothecation of bonds and mortgages or other securities as collateral thereto for their reimbursement and indemnity and the notes proving to be illegal and void, they might then insist upon the fulfilment of the stipulation in respect to the pledge of collaterals as a part of the contract of loan. This would be a case of an equitable mortgage: *Patch on Mort. 27*, and this court would assist them in following the property thus pledged or intended to be and see to the application of it accordingly. So, if any of the parties, on taking portions of the notes in question for a precedent debt, surrendered any thing previously held as security for such precedent debt, relying upon the new security in the place of the old and such surrendered property has found its way into the hands of the complainant, the court will compel him to restore it, as a condition of the decree annulling the new security.

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This rests on the very familiar principle that he who seeks equity shall do equity.

Now, I know of no other equitable principles for these parties to place themselves upon, with a view to any special benefit from the assigned property; and if they have not brought themselves within either, they can have no such benefit from it.

It has been objected that without a cross bill these defendants are not in a position to ask such assistance or counter relief. I believe they can claim it as a condition of the relief granted to the other side without a cross bill. I shall, therefore, proceed to examine their respective claims.

The first I have to consider with reference to this subject is that of Mr. Henry Yates. His case is simply this. In January and February, 1841, he lent to the company his three promissory notes of \$2500 each, payable at short periods, and which he paid as they became due. These notes were made solely for the accommodation of the company, and, at the time of giving his notes, he received as many of the trust notes as made up the same amounts, viz. \$7,500. These notes he still holds. At other times, he endorsed for the accommodation of the company certain negotiable paper and at the same time the company made to him notes of corresponding amount and delivered to him certain of the trust notes as collateral security for his liabilities. Some of these liabilities are still outstanding, not having been paid, nor yet has he been discharged from them; and on account of those outstanding liabilities he still holds ten thousand dollars in amount of these trust notes. In other transactions Mr. Yates became possessed of other large amounts of the trust notes by purchase from Mr. Thomas E. Davis and of these he now holds fifteen thousand dollars in amount, making a total of trust notes held by Mr. Yates of \$32,500, for which he claims to have an equitable lien.

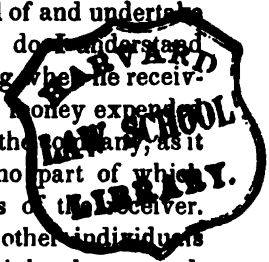
In all these transactions, Mr. Yates does not appear to have relied on anything beyond the apparent goodness of the notes and the validity of the trust on which they were based. He asked for no better security, required no other pledge and took no stipulation for any other in the event of

the failure of the trust deed. He had no promise of an assignment, deposit or transfer of bonds and mortgages or other securities for the specific purpose of meeting the liabilities he was under, or was about to assume, or to reimburse the money he might lend or advance, or to pay the trust notes he might purchase. All that he appears to have taken any pains to satisfy himself about, besides what was expressed in the body of the trust deed and upon the face of the notes, was, that Mr. Davis and Mr. Strong, from whom he was about to receive some of the notes which had been issued or delivered to them by the company, had given or paid full value for such notes—and upon being informed by the president that such was the fact, he was satisfied to take the notes upon their own intrinsic merits. He sought for no additional security, and received no assurance that led him to expect any other or better. I do not, therefore, perceive any thing, in the nature of an equitable mortgage, which he has a right to fall back upon in the event that has happened or which the court can lay hold of and undertake to enforce for his particular benefit. Nor do I understand Mr. Yates as having parted with any thing when he received the trust notes or any of them, except money expended or applied to the payment of the debts of the company, as it is fair to presume before its failure, and no part of which has or is likely ever to come to the hands of the receiver. The same may be said of the moneys of other individuals who made advances and in whose behalf it has been urged, that restitution should be made by the receiver before he is permitted to disturb the trust. It is a sufficient answer to all that can be urged on this point, that restitution can only be made of specific money or securities identified by the party claiming and shown to be in the receiver's possession or about to be placed there.

The next, is the claim of the assignees and trustees of the United States Bank of Pennsylvania and of the assignees and trustees of the Girard Bank of Philadelphia. They hold a number of these trust notes, which were received by these banks in lieu of coupons for interest payable upon bonds or obligations issued by the company and secured or purporting to be secured by the first and second half mil-

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lion trust deeds, and which bonds or obligations had been taken by these banks to secure certain loans they had made. The validity of those bonds and of the trusts spoken of, though questioned, are not to be passed upon in the present suit. But, supposing them to be valid, it does not appear that there was any thing attending the delivery of the notes in question as payment or security for the payment of interest on such bonds giving to these banks any special right or equity to a better security for the notes than the general trust on which they purported to be issued. The notes not having been paid, the interest on the bonds remains unsatisfied; and the assignees have all the remedy still which they ever had.

Next in order is Mr. Richard M. Blatchford, receiver of the Commercial Bank.

The Commercial Bank held a large number of the trust notes in question, now held by Mr. Blatchford as receiver, amounting in all to \$80,500. The identity of the notes exhibited is sufficiently proved.

There were various transactions between this banking company and the Commercial Bank, in which these notes were made to serve the purpose of collateral security for other notes and liabilities of the former to the latter. In some instances they were taken in exchange for certificates of deposit issued by the company and held by the Commercial Bank and surrendered when the notes were received. Valuable consideration of some sort appears to have been given in every instance, either in the way of exchange for certificates of deposit, (a species of negotiable paper issued by the company,) or in the discount of paper for the company or for others, to which the notes were attached as collaterals. But in no instance do I find that the Commercial Bank received them upon any other understanding than that they were secured by the trust deed—there was nothing in the use to which the notes were thus applied that gave to them any special character or that furnished any particular ground of equity within the principles I have laid down.

I now come to the transactions of William Vyse, whose executor, Samuel Clapham, presents his claim as a matter of special equity. Mr. Vyse, at the time of his death, was

the holder of trust notes to the amount of \$70,500, and these notes his executor now holds.

Mr. Vyse became a creditor of the company in this way. He bought of the company five bills of exchange, each for £2,000 sterling, drawn on the house of Palmers, Mackillop, Dent & Co., for which he paid in cash \$46,777. The bills were sent to London, but were returned dishonored. He had also lent the company, in cash, at one time \$10,000—at another time \$10,000, and, at other times, two sums of \$3000 each.

On purchasing the bills of exchange, the company delivered to him one hundred sterling bonds as they were called, each bond being for the payment of £250 sterling, these being a portion of the bonds which the company had made and undertaken to secure under and by virtue of either the million or the first or second half million trusts. These one hundred sterling bonds were delivered to Mr. Vyse by way of security to him for the due honor of the bills of exchange; and if the bills should be accepted and paid, he was to hand over the bonds to Messrs. Palmers, Mackillop, Dent & Co. for their use. On lending the two sums of ten thousand dollars each, the company assigned and delivered to Mr. Vyse for his security two bonds and mortgages belonging to the company, amounting together to \$25,000, viz., the bond and mortgage of John McVickar for \$12,000, given in October, 1838, and the bond and mortgage of Thomas Fitch for \$13,000, given in September, 1838. On the return of the bills of exchange protested for non-acceptance, which was some time in January or February, 1841, Mr. Vyse stood as a creditor of the company to the amount of more than \$70,000, and he was then solicited by the president of the company to give up the bills of exchange and the sterling bonds accompanying them and the two bonds and mortgages and take, in the place of them, the trust notes before mentioned to cover the indebtedness. He was reluctant to do so, but being strongly urged and relying upon the assurance of the president and the opinion of their counsel that the notes were valid and well secured by the trust deed, he finally consented, and did accordingly deliver up the bills of exchange and the sterling bonds, and re-assign the two bonds

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and mortgages upon receiving from the company the trust notes now in the hands of his executor. The two bonds and mortgages of McVickar and Fitch are now among the assets of the company covered by the deed of assignment of the 15th of December 1840—they remain unpaid; and upon setting aside the deed and trust, they will pass into the hands of the complainant. Under the circumstances of this transaction, seeing that Vyse was a creditor for money actually lent to the association, independent of the bills of exchange and upon the strength of the two bonds and mortgages transferred to him at the time as security for its repayment, those securities now coming into the hands of the complainant he is bound to restore, in order that they may again be held to answer the purpose of the original transfer to Vyse. So, with regard to the one hundred sterling bonds if they are still in existence uncanceled and in the possession or under the control of the complainant, he must, likewise, return them to Vyse's representative, in order that he may have the benefit of them as security for his debt, if indeed they can be deemed any better security than the trust notes he already holds. The protested bills of exchange, likewise, may be handed back if they can be found.

The claim of Mr. Ezra Clark is next to be considered. Mr. Clark is the holder of trust notes to the amount of \$5000, received by him from the company in payment or exchange for a certificate of deposit of the like amount issued by the company some time in 1839. That certificate had been in pledge, and not having been redeemed it was sold at auction to the highest bidder, and Mr. Clark became the purchaser—at what price no where appears. He applied at the office of the company for payment of the certificate, and was prevailed on to take the amount in trust notes. The certificate he surrendered, and probably it has been cancelled. He surrendered no other security, for he had no other. There is no evidence that, in taking the notes, he had the promise or expectation of any other or additional security to which he might resort, in case the notes or the trust should prove a failure. Hence, there is nothing else in the shape of security which the court can now help him to receive.

Next is the case of Messrs. DeLaunay & Co., who are

made parties to this suit as holders of some of the trust notes.

Their transactions with the company consisted in their drawing bills of exchange in April, 1841, to a large amount on their house in Havre, payable in sixty days and delivering the same to the company for its use, the company stipulating to furnish them in fifty-five days with an equal amount of bills of exchange adding interest, and, at the same time, delivering to them, for their security, sixty-four Arkansas state bonds of \$1000 each and trust notes to the amount of \$30,000 more. The company failed to comply with its stipulation except in part. Twenty-five of the Arkansas bonds were sold and the money applied to the bills of exchange. The credit to the company was renewed for the balance by new bills of exchange drawn and delivered in June, 1841, under a similar stipulation, DeLaunay's house retaining the 39 Arkansas bonds and all the trust notes as before for their security. Subsequently, 14 more of the state bonds were sold and the proceeds applied to the bills of exchange, so that, in October, 1841, the amount due from the company was reduced to \$19,573, which balance is still due with interest, and they still remain in possession of the notes and in possession of the remaining 25 Arkansas state bonds. The bonds, however, have become so depreciated in market value, that, if sold, they would fall short of paying the balance of the debt. The question is not whether the complainant shall restore to them any thing that may be likely to come into his hands, for DeLaunay & Co. have no specific claim of that sort to make. They only claim, as a matter of general equity, in the event of the trust and notes being void, to have the assigned property applied *pro tanto* to the payment of their balance; and that they may be left in the undisturbed possession of the securities they hold. No question as to their right to take and hold and apply the Arkansas bonds in the way they have done and still propose to do has been made before me; and, of course, the decree in this cause will not affect that question if it ever should arise.

I now come to the case of Messrs. Palmers, Mackillop, Dent & Co., of London, who have had very extensive financial dealings and transactions with the company, and who

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are made parties to this suit on account of large interests they have at stake in the trust and in the trust notes.

In 1839 and 1840, prior to August, the company had transmitted to the house of Palmers, Mackillop, Dent & Co., large quantities of the American securities before spoken of for sale. The company had also sent to them, for the like purpose, large amounts of the certificates of deposit and bonds issued by the company, payable in sterling money, and, therefore, denominated sterling bonds and sterling certificates and purporting to be secured by trusts. The shares also in the capital stock of the company, which had been bought up for account of the company itself, were likewise sent out in order to be sold again. Sales to a considerable extent were, from time to time, effected by Palmers, Mackillop, Dent & Co. Against the proceeds and upon the credit of the security which the possession of so much convertible property afforded or was supposed to afford, the company drew bills of exchange, which were duly honored and paid, generally in anticipation of cash receipts, so that Palmers, Mackillop, Dent & Co., were often called upon, in that way, to make advances of large sums for or on account of the company. In the course of this business from the commencement down to some time in the month of August, 1840, the cash receipts, which had come to the hands of Palmers, Mackillop, Dent & Co., from all sources on account of the company, exceeded seven hundred and eighty thousand pounds sterling. The drafts, in the mean time, had more than anticipated this great amount of money, and Palmers, Mackillop, Dent & Co., stood as creditors of the company for a large balance in their favor, with some remnants of securities on hand, but not sufficient to justify the company in making any further drafts upon them. The officers of the company nevertheless continued to draw more bills of exchange, and on the 31st July, 1840, drew seven bills, amounting to £7573 15s. 2d., all in favor of their own cashier, and by him endorsed to render them negotiable.

The drawing of these bills was accompanied by letters dated 1st August, 1840, addressed to Palmers, Mackillop, Dent & Co., one from the cashier, merely stating the fact that such bills had been drawn, which they would please to

honor and debit to the account of the banking company; and the other from the president, (Mr. Beers) explaining the necessity of making those drafts and showing reasons for inducing the drawees to honor them. The following are passages from Mr. Beers' letter, viz: "Under the arrangement entered into with the United States Bank and others, to meet our payments on the first of July and for several months to come, we have valued on you at this time for about £7500. This measure is adopted with the greatest reluctance, but it is wholly unavoidable. In addition to the surplus of \$200,000 of mortgage bonds now in your hands we are preparing and shall send out at least \$200,000 more of similar securities in a few days, it being our intention to keep you fully covered. Although these securities may not be at once available to you, we feel confident that you will, with the explanations you will receive from Mr. Blatchford, sanction our course.

"Unless we had come into this arrangement with the parties on the 1st ultimo, the bank must have suspended—an event which would have rendered the sale of the mortgage bonds impracticable and had a most baneful tendency in every respect. Should we not carry out the whole arrangement, and our bills drawn under it should now be dishonored, similar consequences would flow from it. We are calling in and liquidating our assets as rapidly as possible, and we feel well assured that, in a few months, with your countenance and support we can revive our credit and discharge our liabilities. I am mortified that the necessity of the case compels us to make a further appeal to your magnanimity, which has been so strongly manifested during our intercourse. The position in which we have been placed for the last few months has been trying in the extreme. To avert a sudden and consequently disastrous winding up of our affairs, has been our great aim—without your aid that unfortunate issue cannot be avoided."

The seven bills of exchange spoken of were presented on the 17th and 18th August, and were accepted—and on the 31st of the same month, Palmers, Mackillop, Dent & Co., replied to the letter from Mr. Beers, as follows:

"The matter of primary importance therein alluded to, is

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the further negotiation of bills upon us to the extent of £7573 15s. 2d. After the very positive manner in which we wrote you on the 3d of June, we are now certainly surprised you should have adopted this course. You refer to explanations on the subject from Mr. Blatchford, but that gentleman has not written to us. We are aware that, in the last arrangement made by your institution with the United States and Girard Banks, mention is made of further drafts on London to the extent of \$150,000, but without the slightest authority from us for such proceeding. Under your assurance that \$200,000 further mortgage bonds are on the way to us, we have accepted the above amount, but we beg distinctly to inform you that any other bills that may appear will have to be returned and provided for in New York, as we can go no further, and we feel this course imperatively necessary, for the credit of the bank being so completely annihilated, all parties connected with it are liable to be more or less affected by such discredit."

Three days after writing this letter, Palmers, Mackillop, Dent & Co. were again surprised by the appearance of another bill of exchange drawn upon them in like manner as the others under date of the 8th August, 1840, for £2694 2s. 2d. This was accompanied by a letter from Mr. Beers, in which he says:

"We draw upon you to-day for £2694 2s. 2d. sterling, in favor of our cashier, and rely upon your acceptance. The bonds under the new trust for \$250,000 will be sent by the Great Western, &c. In the mean time I beg you will be assured of our devoting all our efforts to put our institution in the best possible condition. We shall, in no case, value upon you unless under positive necessity, and, then, with a determination to protect you under any circumstances."

Notwithstanding the promise of further bonds, they refused at first to honor the bill, and it was noted for non-acceptance. A few days afterwards, however, at the instance of James B. Murray, the agent of the association at that time in London, they accepted the bill. They were induced to do this upon Mr. Murray's representations as to the abundant means of the company ultimately to meet all its engagements, and upon his stipulation, in regard to placing

them in possession of large amounts of other securities in the shape of mortgage bonds; it being contemplated, at the same time, that further bills of exchange might be drawn, which, with the eight bills already presented, would amount to £15,000. It was about this period also, that 125 bonds of £250 sterling each, purporting to be secured by a trust, were received in London by Palmers, Mackillop, Dent & Co., the same having been sent from New York on the 18th of August. Murray's stipulation, above alluded to, is contained in a letter addressed by him to Palmers, Mackillop, Dent & Co., dated London, Sept. 8th, 1840, and is to this effect: that, in consideration of their having consented to accept bills drawn, or to be drawn, subsequent to the 1st of August, to the extent of £7500, the company should deliver to their agent in New York such approved securities as would enable their agent to remit to them £15,000, that being the amount drawn (or supposed to be drawn) against the 125 bonds sent out, and such further bonds as were expected soon to arrive; that, for the purpose of enabling the company to furnish such approved security, all these bonds were to go back to New York by Mr. Melvil Wilson, and were to be delivered up to the company. On Mr. Wilson's arrival in New York in October, with the 125 bonds, he placed them in Mr. Blatchford's hands as the agent of Palmers, Mackillop, Dent & Co., for the purpose of being delivered up, on receiving other securities in pursuance of Murray's arrangement. The company was unable to comply with the arrangement. Securities that would produce the required amount in money, could not be furnished. A negotiation then took place. The company at length proposed to give fifty-two of the trust notes in question, of \$1000 each, as a security for the acceptance of Palmers, Mackillop, Dent & Co., instead of the 125 bonds. This the agent agreed to accept, subject to the ratification of his principals. The notes were received and sent to London, and were accepted as security for £10,267 17s. 4d., (being the amount of the eight bills of exchange accepted and paid,) and the interest thereon; and upon this ratification of the agent's agreement, the 125 bonds were delivered up to the company. As an additional security, Palmers, Mackillop, Dent & Co. appear

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to have obtained from the company twenty-five more of the same description of notes, making seventy-seven; and from James B. Murray, in some transaction with him, ten more, making in all eighty-seven notes of which they are at present the holders.

These facts sufficiently show how Palmers, Mackillop, Dent & Co., became possessed of the notes and the purposes for which they received them. The question is here, as in the other cases I have been considering, whether there is any special equity to be administered in their favor, on the notes turning out to be as valueless as so many pieces of blank paper? They will hardly be satisfied with a return of the 125 sterling bonds, which are admitted to be in the hands of the complainant, in the same condition as when they were delivered up to the company. These bonds in all probability are as little available as the notes. Whether they are equally invalid is a question not to be decided in this suit. If they were based upon a trust, that is, if a deed of trust was ever executed setting apart or appropriating any bonds and mortgages by way of securing the payment of these bonds, it is just as likely to be contested as were the trust deed and notes involved in the present suit. But was there ever, in reality, any trust or transfer of bonds and mortgages or other securities for the payment of these 125 bonds? On the face of the bonds they purport to be part of 450 bonds (numbered consecutively from 1801 to 2250, and these 125 are numbered, beginning with 1801 and going up to 1925 inclusive) issued by the company on the 1st day of February, 1840, when they bear date, and secured by a transfer of bonds and mortgages of various individuals, amounting in the aggregate to \$600,000, under a deed of trust bearing even date therewith and placed in the hands of the three persons named as trustees, who were thereby irrevocably appointed to hold the same as a special pledge for the indemnity of the holders of the bonds. The company had at that period, (1st of February, 1840,) and by instruments of the same date founded what are denominated the "Million Trust," and the "First Half Million Trust," and the "Second Half Million Trust." The object of these three trusts was to secure the payment

of 1800 bonds in form like the 125 bonds and all of the same amount, viz. £250 sterling, with interest—900 bonds purported to be secured by the Million Trust and 450 by each of the Half Million Trusts—and these 1800 bonds were numbered consecutively from No. 1 to 1800. It seems to have been a part of the scheme for them to continue issuing bonds in the same consecutive order from 1800 upwards, as occasion should require, to be secured by a fourth trust of precisely similar character and in the hands of the same three trustees to the amount of \$600,000. Four hundred and fifty bonds was the complement for this trust. One hundred and twenty-five of them were issued and used, importing a trust, but such deed of trust or transfer of property was never made. These bonds, however, are spoken of by some of the witnesses as bonds belonging to a trust for a quarter of a million loan. And we find Mr. Beers, in his letters of August, 1840, speaking of a new trust and of sending out bonds "under a new trust for \$250,000," as an inducement for Palmers, Mackillop, Dent & Co. to accept the bills of exchange. How the one hundred and twenty-five bonds sent were to be connected with a trust to that amount, when they purport to be founded on a very different one, is not explained. A trust for a loan of two hundred and fifty thousand dollars was attempted to be created about the time these bonds were sent, but it appears to have been abandoned. A selection of bonds and mortgages for the purpose of being placed in such a trust was made and this was followed up by an entry in the journal of the "Real Estate Department," by which the "Banking Department" was debited with a list of bonds and mortgages, amounting to three hundred thousand seven hundred and eighty dollars, "put into the hands of R. M. Blatchford, Lewis Curtis and John L. Graham, trustees of \$250,000 loan."

But, besides this entry in the book, there is no evidence of the bonds and mortgages having been actually delivered to the proposed trustees or that they ever consented to accept or take the trust upon themselves. If, however, Palmers, Mackillop, Dent & Co., as the holders of the 125 bonds, acquired any rights under that intended trust before

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the completion of it was relinquished, then the relinquishment of it would not affect those rights. But claiming as holders of the bonds, it is for them to show that, by the terms of the trust as proposed, it was intended to cover these particular bonds. The proof on this point is feeble. The fact is rather conjectural, than otherwise. The circumstance that the bonds were sent and received by them as bonds secured by a trust, is scarcely to be taken as evidence of the fact that they were secured by the identical trust mentioned in the entry on the books, since this might mean a trust for a loan having no reference to such bonds. If, therefore, Palmers, Mackillop, Dent & Co. were still the holders of the 125 bonds, I do not see that they have shown a right to payment out of such a trust or out of the property such a trust was intended to cover. But, aside from the trust notes and the bonds—laying them entirely out of view—treating them as no longer of any force or effect, not even as evidence of an indebtedness, (and Palmers, Mackillop, Dent & Co., have no occasion to resort to the notes or bonds for that purpose, for they have that evidence from the eight bills of exchange which they accepted and paid as mere accommodation acceptors,) an important question is, whether, for the amount of those bills and interest, they have not a claim in the nature of an equitable lien, pledge or mortgage upon some portion of the assets or effects belonging to the banking company at the time those bills were drawn?

They claim that they have such a lien in equity and especially upon the twenty-six bonds and mortgage amounting to \$300,780, selected for the purpose of being put under the new trust for a quarter of a million loan. These same bonds and mortgages, it is admitted, were afterwards put into the Yates, Talmage and Noyes trust and form a part of the subject matter of this suit.

This question does not arise and they can have no pretence for making such a claim if the payment of the bills of exchange does not constitute a lawful debt or demand against the banking company, owing to the unauthorized and illegal character of the business in which this bank was engaged and out of which the bills arose and to which

the monies paid upon them were applied. I am not disposed to create any doubt of that kind with respect to this demand. I shall regard Palmers, Mackillop, Dent & Co., as meritorious creditors for the £10,267 17s. 4d., paid upon the bills of exchange, as so much money advanced by way of loan to the banking company or paid for its use. Drawing the bills in favor of its own cashier at a time when there were no funds or convertible means in the hands of the drawees to meet the drafts, was, in effect, like sending its cashier personally to borrow so much money. It is true, there had been previously the extensive business of selling state stocks and bonds and securities and the drawing of bills of exchange, but the state of the business did not justify the banking company in drawing any more bills upon the credit of the depreciated and unconvertible property remaining unsold. The acceptance of the bills was, therefore, a matter of favor and deserves to be considered by itself as an independent transaction. So far as regards the banking company and its officers, the drawing of the bills was resorted to as a part of an arrangement entered into with the bank of the United States to raise funds to meet their payments on the first of July previously and for several months afterwards. This appears from Mr. Beers' letter of the 1st August, before quoted. But Palmers, Mackillop, Dent & Co., in their reply on the 31st August, entirely reject that as a ground of proceeding which was to affect them. After adverting to the positive manner in which, on the 3d of June, they had forbidden any more drafts upon them and expressing their surprise that the first seven bills should have appeared, they speak of being aware of the arrangement referred to for placing further drafts on London to the extent of \$150,000, but expressly say that such a proceeding was without the slightest authority from them. They were not, therefore, in the least compromised by that arrangement and it was not on that account they were induced to accept. Again, so far as the matter of pecuniary security was concerned, as an inducement for them to accept, Mr. Beers, in his letter, refers to a surplus of \$200,000 of mortgage bonds in the hands of Palmers, Mackillop, Dent & Co., and to \$200,000 more of similar securities they

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were preparing to send in a few days. In their reply they put their inducement for accepting the bills on the ground of the "assurance that \$200,000 further mortgage bonds" were on the way to them.

It thus appears that the security they relied upon for entering into this new and additional liability was the mortgage bonds already on hand and the further mortgage bonds preparing to be sent to them. The 125 bonds were shortly afterwards sent, as being the bonds promised and they were received as such without objection.

If this were the whole case, the most the court could do, in my opinion, would be to order those bonds to be restored to the possession of Palmers, Mackillop, Dent & Co. But their claim is made to reach beyond the mere restoration of the bonds. They seek to establish an equitable charge or lien upon the twenty-six bonds and mortgages alleged to have been set apart under the new trust for a quarter million loan. With every disposition and even effort on my part to discover sufficient facts to make out, by equitable construction, a pledge or mortgage of those securities for the payment of the bills of exchange, I confess myself at a loss how to do it. I can find nothing in the case before me that looks like a general or specific pledge of securities for the indemnity of the acceptors of the bills of exchange, except it be a pledge or hypothecation of "mortgage bonds" issued by this banking company, based upon a trust contrived by its officers. All the bonds and mortgages ever taken by the company for capital stock or otherwise, were, I believe, sooner or later assigned, in order to make up a trust. I have not heard of one that escaped falling into the hands of a set of trustees, whereby to start some new issue of paper either for sale, as a commodity in the money markets or to be pledged for loans or to be given in exchange for previous liabilities. Hence it was that the banking company had no bonds and mortgages to pledge as security for the bills of exchange, nor did the president think of offering to Palmers, Mackillop, Dent & Co., the security of bonds and mortgages to be directly assigned to them or to any third person for their particular benefit or use. In his letter of the 10th of August, before quoted, containing the strongest

expressions of a "determination to protect them under any circumstances," Mr. Beers refers to no other means of doing so than by bonds under the new trust for \$250,000; and in Murray's London letters interceding for the acceptance of the bills of exchange, it is "mortgage bonds" already in their hands and such additional "mortgage bonds" as should be sent to them that are alone spoken of as the securities specially pledged for the payment of any balance that should be found due to them from the company upon the closing of their account, as well as for the payment of "debenture certificates," a newly contrived issue of paper set on foot by Mr. Murray in London, as another means of raising money; and in his letter, also, of the 8th September, stipulating in behalf of the company to furnish "approved securities" in exchange for the 125 bonds, to be effected in New York and which resulted in the delivery of the 52 notes of the Yates, Talmage and Noyes trust, no mention is made, nor the least idea held out of any other form of "securities" than such as the banking company had been and still were in the practice of issuing, based upon the creation of trusts. This distinction I make is an obvious one. It is between bonds and mortgages executed to the banking company and used in making up some certain amount for a trust and assigned to trustees accordingly, and bonds or notes issued by the company purporting to be secured by a trust thus created. The latter were frequently the subject of hypothecation and pledge to the individual creditors of the company, but the former not—and in this instance, it was not the twenty-six bonds and mortgages which were promised as security, except through the medium of a trust in third persons; and it was only in that manner and through such a medium that creditors were to be benefitted. This was the promised security and nothing else. I cannot, therefore, undertake to create a direct lien or charge upon the 26 bonds and mortgages for the payment of the bills of exchange. All that the court of chancery can do, in cases like this, is to carry into effect the contract; to put the parties in possession of all they stipulate for and were to receive. This is upon the principle of considering that as done which was agreed to be done, provided it is not

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against good morals, public policy or the positive enactments of the legislature.

In this view of the case, Palmers, Mackillop, Dent & Co. are entitled to have returned to them the 125 bonds, surrendered when they received the trust notes in question ;—and if, by virtue of those bonds, they can establish a claim upon any trust fund actually created or intended to be created or upon any property or assets of the banking company set apart and appropriated to the payment of the bonds and can show a right to have the money raised out of any property to which such trust has attached, in order to liquidate the amount of the bills of exchange, they will be at liberty to do so. The decree may reserve to them the liberty of taking such course as they may be advised for that purpose, either against Mr. Leavitt the receiver or against any other person who may have acquired possession of any of the alleged trust property.

I have now done examining all the claims presented, on the hearing of the cause, in behalf of holders of notes issued under the trust deed of the 15th December, 1840, which notes and deed it has become my duty to declare void, as being of no force and validity in the law against the complainant in his capacity of Receiver. There are a number of other persons, besides the claimants I have mentioned, who hold some of the notes, and have, therefore, been made parties to this suit, but who have not appeared and answered. Any claims they have been supposed to have or hold, by virtue of such notes, upon the property covered by the trust deed of assignment, will be cut off by the decree I am about to make.

It must be understood, however, with respect to all the holders of these trust notes, that the decree is only to declare the notes void in their hands, so that they are not to be used as evidence of debt against the North American Trust and Banking Company or its receiver. Beyond this, I make no decree affecting the holders of this paper. I am not called upon to determine, (because such determination is not necessarily involved in the case,) whether or not the persons, who have received notes connected with this trust, are to be considered as creditors of the company, irrespective of the notes, and how far they may have a right to participate in

the distribution of the property which Mr. Leavitt, as the receiver, may hereafter make. It is rather incidentally, than otherwise, that I have intimated an opinion in respect to some of the parties dealing directly with the company, that they may go back to the original consideration on which their claims arose. Perhaps, throwing aside the notes, they may all be able to show that they are creditors to some amount if not to the whole amount of the notes.

The decree must contain a reservation of their rights in that respect.

With regard to the trustees, Messrs. Yates, Talmage and Noyes, the decree must direct them to surrender the property which passed into their hands under or by virtue of the trust deed and to account before a master for the disposition made of the same and of its proceeds. All those portions of the assigned property heretofore placed by any order of this court in the hands or possession of a special receiver, must likewise be given up to the complainant, with its proceeds, under the direction of a master, after all just allowance to the special receiver or receivers, who will then be discharged.

I have considered the point with regard to the allowances to be made to the trustees on the breaking up of the trust and the surrender of the property; and although the trust deed provides for a salary or compensation to them out of the property assigned, yet, as the whole thing was void, as being contrary to law and not merely voidable at the instance of creditors, I am of opinion they can have no just or valid claim to salary or compensation for any service they may have performed in relation to the trust or the property.

Their right, in that respect, fails them with the failure of their legal title, and the court of chancery cannot undertake to allow a compensation for services voluntarily undertaken and performed in relation to property, over which the parties could not lawfully assume and exercise a control for the purposes they intended. Whatever money has been expended in the keeping and preservation of the property or in the management of it with a view to its safety, while the title was in dispute, including reasonable clerk hire, the keeping

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of accounts and the expense of employing agents to look after the property when necessary, should be paid out of the property and be allowed to the trustees under the head of just allowances. This will be a matter for the master to ascertain and allow on passing their accounts.

I have, likewise, considered the question of costs, which is by no means an inconsiderable matter in a suit of this magnitude. With so many parties, such voluminous pleadings, depositions and exhibits, and so large an amount of money, or that which represents money, involved in the issue, this suit has scarcely had its parallel in this court.

A strong effort is made to have the complainant's costs charged upon the trustees personally, while they and the other defendants contend that their costs should be paid out of the property or funds going into the hands of the complainant.

Awarding costs is a matter of discretion in this court;—a discretion to be regulated and determined by the particular circumstances of each case. The principal parties engaged in this suit are acting in representative capacities; not suing or defending on their own individual personal rights; generally, such parties are not charged with costs to be paid out of their own pockets. While I think the trustees, Messrs. Yates, Talmage and Noyes, may be excused from paying the complainant's costs of the suit, because, from the position in which they stood, they could not well do otherwise than defend it, yet considering that they were not strangers to the transactions of the banking company when they consented to become trustees and undertook the performance of the trust, I do not feel justified in saying that they are to have their costs out of the property or fund. The least I can do is to leave them to bear their own costs of the suit, while the complainant is left to charge his costs to the fund coming into his hands. So, with regard to creditors who have appeared and set up claims and have succeeded to some extent in regard to particular equities: they also are entitled to taxable costs out of the fund. This, however, extends only to the executor of Vyse and to Palmers, Mackillop, Dent & Co.

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HALE, Receiver, &c. v. GOUVERNEUR and wife, and others. GOUVERNEUR.

Where a bond of a husband and a mortgage made by husband and wife are explicit as to principal becoming due in default of payment of interest within a specified number of days, the court cannot relieve from a foreclosure on default of payment of interest within the number of days fixed, although the amount may be large and the property mortgaged belongs to the wife, and the debt was the husband's. Nor, on payment of interest and costs.

Although, on a mortgage of the wife's land for the husband's debt, she is as a surety and his estate, as tenant by the curtesy, will generally be decreed to be sold first, yet, when the sale of it cannot possibly make the amount due, the whole interest of the husband and wife will be sold together.

BILL for foreclosure and sale. The case came up on the pleadings. The mortgage had been given on a wife's property to the Merchants Marine Insurance Company, for securing a bond of the husband's conditioned to pay the sum of twenty-five thousand dollars in five years from its date at the option of the said company at any time after three years, together with interest, and so that if any default should be made in the payment of the interest or any part thereof on any day whenever the same was made payable, and the same should remain unpaid and in arrear for the space of thirty days, then and from thenceforth the whole principal sum and the interest in arrear should become due and payable at the option of the said Merchant's Marine Insurance Company.

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*Mortga-  
gor and  
Mortga-  
gee.  
Husband  
and Wife.  
Wife's es-  
tate  
mort-  
gaged for  
husband's  
debt.*

The bill set forth the mortgage in the ordinary form in foreclosure bills; and stated that the said sum of twenty-five thousand dollars, together with the interest on that sum from the thirty-first day of December, one thousand eight hundred and forty, still remained due and unpaid, and that, by reason of the default of the mortgagors to pay the interest of the said principal sum for more than thirty days after the said interest had become due, the whole of the principal sum with the interest thereof had become due. There was also an allegation that a part of the principal money had

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been advanced and used to pay off former mortgages on the wife's property.

The defendants, husband and wife, answered separately. The former admitted the execution of the bond and mortgage and that the interest was still in arrear as mentioned in the bill; but, as regarded the express agreement that if default should be made in payment of the said interest, and that if thirty days thereafter the said interest remained still unpaid, then, that the whole principal sum, with interest, should become due and payable, the said defendant thought the said agreement harsh and unequitable and inconsistent with the relationship of mortgagor and mortgagee. Also, that he never read the said bond and mortgage at the time of the execution thereof, but was merely informed by his agent that they were of the general character of bond and mortgage and given for the security of the said principal sum mentioned therein with interest, without entering into further particulars. And the defendant insisted that the principal was not payable until five years had elapsed; and that, on payment by him of all interest in arrear and costs before a decree of sale, then that the said bill should be dismissed. Also, that the complainant's solicitor refused to receive the interest and costs without the principal.

The wife, in her answer, stated, that the title to the said mortgaged premises, at the time of the execution of the mortgage, was regularly vested in her as owner of the fee thereof in her own right; that her husband had a life estate therein as tenant by the curtesy; that she executed the said mortgage to secure the payment of her husband's bond, which having done she claimed the rights of a surety as well as those of a married woman; and she insisted that her interest in the said premises ought not to be sold until her husband's right therein as tenant by the curtesy should have been first sold and the proceeds applied to the payment of the bond and the interest thereon.

The case came before the court on bill and answers.

*April 3,*

THE VICE-CHANCELLOR:—There is not sufficient ground on which to refuse a decree. The condition of the bond is very explicit, to render the whole of the principal sum pay-

able in case of default of punctual payment of interest. The court is bound to give effect to the bond according to the proviso in its condition: *Noyes v. Clark*, 7 Paige's C. R. 179. The mortgage was given to secure the payment of the bond pursuant to its terms. The whole debt having become due, the court has no authority to compel the complainant to stay proceedings on payment of mere interest and costs. Whether the mortgage was given of the wife's property to secure the husband's debt, or was not, can make no difference in this case. Even if the wife is to be regarded here as a surety for the husband, still, there are no facts or circumstances through which she is entitled to be exonerated. True, the husband's estate by the curtesy might be first sold; but as it is very certain that this would not produce enough to satisfy the present large amount of debt, the whole interest of both husband and wife had better be sold together: *Niemcewicz v. Gahn*, 3 Paige's C. R. 614.

There must be a reference to a master to compute the principal and interest due on the bond and mortgage; and, on the coming in and confirmation of the master's report, the master will proceed to advertise and sell in the usual manner.

Decree accordingly.

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CROSBY, Administrator of Balbi, deceased, v. BERGER and  
others, Executors, &c.

A party not affected by another's being made a defendant, cannot demur because the latter is wrongly made a party.

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*Pleading.  
Parties.*

SEE this case, 3d vol. 538.

The defendants now demurred, on the ground principally that the attorney general, who was made a party, was not a necessary party.

THE VICE-CHANCELLOR overruled the demurrer, principally on the ground that the defendants had no right to take the objection that the attorney general was not a necessary or proper party ; and especially as these defendants could not be injured even if he were improperly made a party defendant.

Mr. *R. Lockwood*, in support of the demurrer.

Mr. *J. L. Mason* and Mr. *B. F. Butler*, contra.

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CARROLL v. ROOSEVELT, Executor, &c. and others.

Where complainants have a common interest in all the matters of the bill and the defendants are concerned only in portions and a demurrer is interposed for multifariousness, the court will look to convenience and expediency and use its discretion as to a dismissal of the bill.

DEMURRER to the bill on the ground of multifariousness.

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The bill was filed by the complainant Barbara Julian Carroll, one of the children of Matthew Carroll, heretofore of the city of New York, deceased. It set forth his will, whereby he gave and devised the residue of his real and personal estate to his executors, in trust to sell and invest. And directed his executors to make a suitable provision for the maintenance and education of his children until they should severally arrive at the age of twenty-one years; and when the eldest, who should be then living, should arrive at the age of twenty-one years, he directed that just and equal distribution of all that remained should be made among such of his children as should then be living and the children of either of them who should have died leaving children, &c. &c.

~~~~~  
*Pleading.*  
*Multifariousness.*  
*Demurrer.*

The bill went on to state that the testator left him surviving his widow Sarah Carroll, and the complainant with Nicholas Carroll and Catharine S. Carroll, defendants, his children. That he died possessed of a large property, (describing the real estate.) That, by an indenture dated the first day of May, one thousand eight hundred and thirty-seven, a lot of land was conveyed in fee to the said Sarah Carroll and that the consideration therefor was paid out of the funds of the estate of the said testator Matthew Carroll. That the said Sarah Carroll and Mr. Denis McCarthy duly qualified as executors to the aforesaid will; but that the said McCarthy had since died, leaving the said Sarah Carroll the sole surviving acting executrix. That she had made large advances to the son Nicholas Carroll, over and above necessary expenses and support; but, that al-

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though it was true that the complainant, as well as her sister Catharine S. had been maintained and educated and treated with the utmost kindness and liberality of treatment, yet no advances out of their father's estate had been made to them. That the said Nicholas Carroll, the eldest son, who was the eldest son who had survived him, arrived of age on the fourth day of August, one thousand eight hundred and thirty seven; and that, at that time, pursuant to the terms of the said will, the said executrix ought to have made a just and equal distribution of all of his residuary estate; but that it had not been done. That if such distribution had been made, the said Nicholas would have been found indebted to the complainant and to her sister Catharine S., on account of advances already made to him; and that the complainant and her said sister would have been entitled to devise the whole of the said property between them. That, notwithstanding this, the said Sarah Carroll, executrix and trustee aforesaid, had conveyed a lot of the testator's real estate situated in Ferry street to the said Nicholas in fee and, although the conveyance of the same expressed a consideration of seventeen thousand dollars, yet, that the deed was wholly gratuitous and without consideration and in violation of the trusts of the said will and in disregard of the rights of the complainant and of her said sister; and that all this was known to James C. Roosevelt, who had received a mortgage of such lot from the said Nicholas, made to secure his bond conditioned to pay five thousand dollars and interest. The complainant insisted that the said mortgage was void as against her. That James C. Roosevelt was dead; and that his executor James H. Roosevelt (made a defendant) had commenced proceedings in this court to foreclose the mortgage. Also, that the said Nicholas Carroll, with Elizabeth his wife, had made a second mortgage on the same lot to Conrad W. Faber, Guillaume Merle and Leopold Bierwirth; that the last named mortgagees were knowing of the rights of the complainant and of her sister in the premises embraced thereby; and that such mortgage was null and void as against the complainant's rights therein. That the last named mortgagees had proceeded by statute foreclosure

and a sale had been had thereunder to one Christian H. Sand, who, as the complainant charged, acted as agent for them. That she, the complainant, had only lately come of age. *Prayer*: That by a decree the said conveyance executed by the said Sarah Carroll might be declared void and be cancelled of record; that the respective mortgages made by Nicholas Carroll to the said James C. Roosevelt and to the said Faber, Merle and Bierwirth should be set aside; that the said Sarah Carroll, as such executrix, might be ordered to account and distribute; and that the said Sand might be enjoined; and, for further relief.

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Mr. *J. L. Mason*, in support of the demurrer, cited 1 *Mad. Ch. Pract.* 85; *Werley v. Dawson*, 2 *Sch. & Lef.* 367; *Salvage v. Hyde*, 1 *Jacob's R.* 151; *Campbell v. Mackie*, 1 *Mylne & Craig*, 603; *Attorney-General v. Merchant Tailors' Co.*, 5 *Sim.* 285; *Attorney-General v. Merchant Tailors' Co.*, 1 *Mylne & Keene*, 189; *Saxton v. Davis*, 18 *Ves.* 72; *Ward v. Duke of Northumberland*, 2 *Anstr.* 469; *Brinckerhoff v. Brown*, 6 *J. C. R.* 139; *Fellows v. Same*, 4 *Cowen's R.* 682; *Boyd v. Hoyt*, 5 *Paige's C. R.* 65; *Swift v. Eckford*, 6 *lb.* 22, 28; *Story's Eq. Pl.* 224, 407.

Mr. *W. C. Russell*, contra.

THE VICE-CHANCELLOR:—So far as the bill seeks to overthrow the mortgages to Roosevelt and Faber and Merle and the title in the defendant Sand, (under the latter,) on the ground of the invalidity of the mortgagor's title under the conveyance from his mother to him, the objection of misjoinder or multifariousness has no foundation. Although the interests of these mortgagees are distinct, yet they are equally concerned to support the title of their common mortgagor and it is proper to have them joined or to unite them as defendants in the same bill which has for its object the overthrow of that title, in order that they may both interpose their defence. The issue to be tried affects them both and it can be more conveniently tried and determined in one suit than in two in which the proceedings and testimony would have to be in all respects similar.

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The cases of *Fellows v. Fellows*, 4 Cowen's R. 682; *Boyd v. Hoyt*, 5 Paige's C. R. 65; *Swift v. Eckford*, 6 Ib. 22, contain the true rule on the subject and show that it is proper to make both Roosevelt and Sand defendants in the same bill for this particular purpose and object.

But, another question arises, whether it is admissible thus to implead them in a bill which has a further object in view, namely, the taking of an account and the settlement and distribution of the estate between the complainant and the other defendants, in which accounting and distribution the first named defendants have no interest or concern? Some of the cases cited on the argument would seem to answer this question in the negative. The case of *Salvidge v. Hyde* comes the nearest to the case in hand, and in which the vice-chancellor overruled the demurrer, but which was afterwards allowed by Lord Eldon on appeal (5 Mad. C. R. 138, and Jac. R. 151.) In *Campbell v. Mackay*, 1 M'ylne & Craig, 603, before Lord Cottenham, chancellor, it is shown on a review of all the English cases on the subject of multifariousness, that where the complainants have a common interest in all the matters comprised in the bill and the defendants are concerned only in portions of the subject matter that the objection of multifariousness becomes a subject of discretion to be determined and upon considerations of convenience and expediency with reference to the circumstances of each particular case; and the argument there, in support of the demurrer against uniting defendants in that bill, was quite as strong and, indeed, stronger than can be urged in the present case and, yet, both the vice-chancellor and lord-chancellor on appeal overruled the demurrer. That case I deem a sufficient authority for allowing the bill to stand as a matter of convenience, to take the accounts and settle the estate after it shall be determined how far the mortgages in question are valid. Indeed, I do not see but what the mortgagees may become interested in the taking of the accounts with the view to ascertain the amount or value of the share which may still remain to Nicholas; for if his title by deed, under which he gave the mortgage, should fail, his mortgagees may, perhaps, be entitled to claim in equity that those mortgages may be deemed valid incumbrances

on his undivided share of the property. And if, on the other hand, it shall be determined that the mortgages are valid under Nicholas's title from his mother, then this bill, as to these defendants, will be dismissed and they will be put to no trouble or inconvenience in the matter of account.

Order, overruling demurrer, with costs.

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THE PRESIDENT, DIRECTORS and COMPANY of the  
BANK OF AMERICA v. POLLOCK and others.

Where a bill charges that shares of stock have, by fraudulent conduct of one person, got into the possession of two, the latter may be proceeded against in one suit, although they each hold a distinct number of the shares; and it is also right to make the wrong-doing person a party.

Where a clerk in a bank improperly obtained the check of customers and dishonestly drew out money, knowing it caused an overdraw and bought stocks and absconded: *Held*, that these customers were not necessary parties in a bill filed by the bank to reach the stock.

A clerk of a bank, through fraud using the borrowed check of a firm, whose account (in that way overdrawn) was more particularly under his own supervision, withdrew money from the bank and deposited it to his own account at another bank and bought stock with it and caused such stock to be placed in the name of his sisters without consideration: *Held*, that the sisters were to be construed as trustees for the bank defrauded.

THE bill was filed to reach one hundred and forty shares of the capital stock of the Mechanics' Bank in the City of New York.

Jan. 27,  
1843.

The complainants, the president, directors and company of the Bank of America, showed by their bill: that Andrew Pollock had been one of their clerks and had previously to his absconding as therein and hereinafter mentioned, been so for about eight years, during a part of which time he acted as one of their bookkeepers, keeping the accounts of some of their dealers and, among others, of those whose surname or firm commenced with J. and among whom was the firm of Jarvis & Scrymser, with whom the said Andrew Pollock

*Pleading.*  
*Parties.*  
*Fraud.*  
*Trustee.*

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was on terms of great intimacy and confidence. Also that the said Andrew Pollock had two maiden sisters residing in the city of New York, namely, the defendants Sarah B. Pollock and Susan E. Pollock, each of whom owned a considerable amount of personal estate and which was invested, in part, in several of the monied institutions of the said city of New York. That they were informed and believed that the said Andrew Pollock acted as the agent of his said sisters in collecting, from time to time, their dividends, and kept their certificates of stock in a small trunk deposited and kept by him in the vault belonging to the banking house of the complainants. Also, that they were informed by the said Jarvis & Scrymser that the said Andrew Pollock represented to them that he often had sums of money in his hands belonging to his said sisters, and that he was desirous of gaining an interest thereon; and proposed to them that he would, from time to time, make deposits with the complainants to the credit of the said Jarvis & Scrymser; and that, when he wanted the same, they should repay the same with interest; and that, at other times, the said Andrew Pollock was in the habit of borrowing from them, the said Jarvis & Scrymser, their checks drawn on the complainants, under the assurance that he would provide for them. That since the absconding of the said Andrew Pollock and on a diligent and thorough examination of the account of the said Jarvis & Scrymser with the complainants, as kept by the said Andrew Pollock in the ledger of the complainants, they found divers sums falsely credited to the said Jarvis & Scrymser in the said Pollock's handwriting, without any transactions or deposits whatever having been made by the said Jarvis & Scrymser to correspond with or justify the said false credits, but that the checks of the said Jarvis & Scrymser on the complainants to the extent of the said false credits were duly drawn by them and paid by the complainants, which said false credits were to the amounts and under the dates set forth in their bill and made an aggregate sum of eighteen thousand dollars. Also, that the said Andrew Pollock borrowed or received from the said Jarvis & Scrymser eight checks, drawn by them on the complainants which the said complainants duly paid—each being for the sum of eight

thousand dollars ; and which were all paid in the year one thousand eight hundred and forty-one (and in the months of June, July, August, September, October and November) and the entries or debits of which said eight checks, as the complainants had discovered since the absconding of the said Andrew Pollock and as they charged the fact so to be, he falsely and fraudulently erased from the cash book of the complainants with so much care and skill as to avoid detection, except upon a very close and critical examination and inspection ; and which said checks, as the said bill charged, the said Andrew Pollock clandestinely and fraudulently returned to the said Jarvis & Scrymser without the knowledge or consent of the complainants, thereby depriving them of the same as vouchers and debits against the said firm or as the means of detecting the said fraudulent erasures from the said books of the complainants and by means of all which premises making the defalcation to the complainants caused by the frauds and depredations of the said Andrew Pollock amount to the aggregate sum of twenty-six thousand dollars, which corresponded with the amount stated by him in a letter which, after he had absconded, he addressed to his sister the defendant Sarah B. or to his brother. Also the complainants charged that the said Sarah B. and Susan E. Pollock never did, in a single instance, transfer or directly or indirectly ever authorize the transfer or give or execute any power of attorney for the transfer of any of their own stocks or other securities held in various of the monied institutions in the city of New York. That, on the twenty-ninth day of June one thousand eight hundred and forty-two, the said Andrew Pollock had in his possession a check drawn by Jarvis & Scrymser on the complainants for three thousand dollars, which was paid by them—and which the complainants now charged that the said Andrew Pollock obtained from the said firm by fraud and which check he deposited in the National Bank to his own credit. That the said Andrew Pollock, about the time last aforesaid, purchased of Van Vleck, brothers, one hundred and forty shares of the capital stock of the defendants the Mechanics' Bank in the city of New York, which were transferred directly to the said Sarah B. Pollock and Susan E.

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Pollock in equal portions, *i. e.* seventy shares to the one and the same number to the other. That the said Andrew Pollock paid the same by delivering his check on the National Bank, which was duly paid. That he had no funds in the said National Bank at the time of effecting the purchase of the said stock and of the payment of the said check except the check hereinbefore mentioned drawn by Jarvis & Scrymser on the complainants and afterwards paid by them—and which the complainants charged that he, the said Andrew Pollock, had deposited to his credit at the National Bank for the express purpose of creating a fund therein upon which he might draw for the payment of the price of the said stock. They charged that the said shares of stock were purchased and paid for with funds of the complainants fraudulently abstracted and taken from them by the said Andrew; and they insisted that they had a right to follow the said one hundred and forty shares as their own and that the said defendants, Sarah B. Pollock and Susan E. Pollock, held the same in trust for the complainants. That the said Andrew Pollock, having committed the frauds and depredations aforesaid, absconded, and at Boston took passage for England. The complainants charged, on information, that the said Andrew Pollock, while in Boston, addressed a letter to his sister the said Sarah B. Pollock, in which he stated to her, in substance, that all her stocks and those of her sister, the said Susan E. Pollock, were standing in their respective names or still belonging to them, except thirty-five shares belonging to Sarah B. which, he stated, he had improperly made use of and cautioned her not to submit to the transfer thereof—and of which letter the complainants prayed a discovery. *Prayer*, that the complainants might be deemed to be entitled to the said one hundred and forty shares of stock; and, for further relief, and also for an injunction. Parties, the Mechanics Bank, Andrew Pollock, Sarah B. Pollock and Susan E. Pollock.

Each defendant interposed a demurrer on the grounds of misjoinder of parties, want of equity, and for multifariousness.

*Mr. Jonathan Miller* in support of the demurrers.

Mr. *Bidwell*, contra.

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Sept. 12.

THE VICE-CHANCELLOR :—The objection of misjoinder of parties and that the defendants Sarah Pollock and Susan Pollock should be proceeded against separately is not well taken. The case of *Fellows v. Fellows*, 4 Cowen's R. 682, is a decisive authority to show that, although they hold distinct moieties of the stock in controversy, they may, under such circumstances as exist here, be proceeded against jointly. Andrew Pollock is, for form sake, a proper party and the two sisters might have objected if he had not been made a defendant : on the ground, if on no other, that if they lose the stock they ought to have a decree over against him. The Mechanics' Bank are properly made defendants for the sake of the injunction and a decree directing the stock to be transferred on their books : *Lloyd v. Loaring*, 6 Ves. 771. I consider that Jarvis & Scrymser are not necessary parties to this suit. They have no concern in the alleged equity of the complainants to follow the stock. If they are liable to the complainants for money as upon an overdrawing by means of the checks, the complainants must pursue their remedy at law against them ; and this they may or may not do as they shall think proper, whether they succeed or not in this suit *in rem* against the stock. If successful, the only effect will be to lessen their demand so much against Jarvis & Scrymser.

Then, as to the merits between the complainants and the Misses Pollock. According to the statements in the bill, the latter have lost nothing. They are but volunteers, having paid nothing for the shares of stock in question. The former shares which they owned still belong to them. A transfer under a forged power did not pass the title from them and they have only to look after and reclaim their own property. But, still, if the complainants have no right in equity to follow the property, this court will not help them to wrest it from the hands of the defendants, although they be but nominal owners and without value paid for it. The bill shows that the money of the complainants tortiously taken from them has been applied to replace money of the National Bank which was used to pay for the purchase of the spe-

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cific shares of stock in question ; and upon this it makes but a case of constructive trust in equity in favor of the complainants to have the benefit of the property, in which their money, although not directly, yet indirectly, has been invested and to which no other person, except mere volunteers, have acquired any title or interest.

I consider that this case falls within the principle laid down by Mr. Justice Story in 2 Com. Eq. 503, § 1258. The identity of the property is shown and traced ; and, under such circumstances, it can be laid hold of by a court of equity and distinguished from the property of all other persons and handed over to the equitable and rightful owners : *Thompson v. Perkins*, 3 Mason, 232, and cases there cited.

The demurrer must be overruled, with costs ; and the defendants must answer on the usual terms.

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REDMOND  
v.  
WEMPLE.

REDMOND v. WEMPLE and others.

Where a judgment debtor filed a bill, on his own behalf only, against his debtors and their assignees, complaining principally of the latter in allowing the debtors to be their agents and receive large compensation and did not amend, so as to go against the assignment itself until long afterwards, when the property had been distributed, and brought his cause to a hearing on bill and answer when he might, by expedition and replication, have made a sufficient case: his bill was dismissed, but without costs.

If an assignee to pay debts allows the debtor to act as his agent and receive large compensation therefor, he will have to account for the amount to creditors, on a bill filed in behalf of all of them.

CREDITOR'S bill filed against Christopher Y. Wemple and Henry W. Christie, judgment debtors and against their assignees. The assignment under which the latter acted was made the twenty-sixth day of September, one thousand eight hundred and thirty-seven. Bill filed on the first of June, one thousand eight hundred and thirty-nine, and it seemed to go mainly against the conduct of the assignees; but an amendment was made on the third of August, one thousand eight hundred and forty-one, which went against the assignment. The debtors were permitted to act as agents for the assignees and to retain large compensation. The case came up on bill and answer, after the funds had been distributed or passed away.

Jan. 28th,  
1843.

Debtor and  
Creditor.  
Assignment.  
Fraud.  
Assignee.  
Practice;  
Bill and  
answer.

Mr. Eagan for the complainant.

Mr. Mulock for the defendants.

THE VICE-CHANCELLOR:—If this bill had been filed earlier and while the goods remained unsold and the proceeds not paid over, I am inclined to the opinion that the complainant might have succeeded (on filing a replication to the answer) in setting aside the assignment. But he waited a year and a half, after he had recovered his judgment before he filed his bill; and, even then, he did not attempt to impeach the assignment for fraud, but rather went against

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the conduct of the assignees. It was not until the month of August, one thousand eight hundred and forty-one, that he amended his bill, so as to make a case for setting the assignment aside. And, in the mean time, the assigned property had all been disposed of and the proceeds paid over and distributed under the assignment. And, now, the cause is brought to a hearing on bill and answer, without a replication and without giving the defendants an opportunity of supporting their denials of fraudulent intent, by proofs. As the case now stands, there is nothing to show that the assignment is conclusively fraudulent, nor is it fraudulent *per se*; and as all the badges of fraud are either explained or are negatived by general denial of fraudulent intent, the case is within the principles settled in *Cunningham v. Freeborn*, in error, 11 Wend. 240.

The worst feature of the case, as it appears to me, is that the assignors, the judgment debtors, were permitted, by the assignees, to retain, at different times, considerable sums out of the proceeds of the assigned property, on the idea of compensation for services rendered as agents of the assignees in disposing of the goods, &c.; and if the bill had been prosecuted in behalf of all the creditors of the debtors for an account of the assigned property, and with a view to make the assignees or the acting assignee liable for that money as for a misapplication or waste, it is probable the acting assignee might have been held personally liable to make it good to the creditors. But, such is not the aspect or purpose of the present bill; and no decree, to that effect, can be made upon it.

The bill must be dismissed without reservation; but, from the remarks of Chief Justice Nelson, in the concluding part of his opinion in *Cunningham v. Freeborn*, *supra*, on the subject of costs, and which apply with peculiar force to the case in hand, I am disposed to leave each party to bear his and their own costs of the suit.

Decree accordingly.

1843.

CAMMEYER  
v.  
GERMAN LUTHERAN  
CHURCHES.

CAMMEYER and others v. THE CORPORATION OF THE  
UNITED GERMAN LUTHERAN CHURCHES and others.(a)

In a mixed (German and English) Congregation of a German Lutheran Church, one party cannot, on the resignation of its particular pastor, agree with another church that it may bring in its pastor and congregation as a body corporate, with its church establishment. They may invite a minister and individuals to attend and so increase their number.

AN injunction had been granted restraining the defendants, the corporation of the United German Lutheran churches in the city of New York, its officers, &c., from selling or leasing St. Matthews Church, and from disturbing or molesting the English Lutheran congregation of the said church in the use thereof, and from worshipping therein in like manner as the said English congregation were in the habit of using the same and worshipping therein at the time of the filing of the bill, until the further order of the court.

Jan. 30  
and 31,  
1843.

Church.  
Religious  
Corporation.

A demurrer to the bill was pending.

A petition was now presented by the defendants, the corporation. It showed (after mentioning the injunction) that the manner in which the English part of the congregation was in the habit of using the said church and worshipping therein at the filing of the bill was as follows, that is to say certain persons hired by the year, from the agent of the corporation, the use of pews and seats in the said church and regularly paid rent therefor to such agent, and such persons, denominating themselves the English congregation of the said church, attended, with or without families, on Sunday afternoons when service was performed in the English tongue by the Reverend Mr. Geissenhainer. That, at the time of filing the bill, the corporation, in all other respects than as above specified, had the absolute and exclusive use, possession and enjoyment of the church and its appurtenances; and that, at the time of the filing of the bill, the cor-

(a) For a full particular of this case on the merits, see 2 Sandford's V. C. Reports, 186.

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poration did bear and pay all the charges and expenses of maintaining divine worship in the said St. Matthews Church of every kind and description, including the salaries of all servants and officers, save and except only the maintenance or recompense of the minister of the said English congregation; and that the said defendants, the congregation, had continued to bear and pay such costs and expenses with the exception aforesaid. That the said English corporation had been gradually but regularly declining for some time prior to the filing of the bill; and that the same congregation continued to decline thereafter until the same had been reduced to an extremely small body. That, as the petitioners had been informed and believed, the minister of the said English congregation, namely, the Reverend Frederick W. Geissenhainer, had retired from the alleged pastoral charge thereof, having, on Sunday afternoon, preached his farewell sermon in the said St. Matthews Church. That, although the said complainants, Augustus T. Cammeyer and others of the said English Lutheran congregation, had, ever since the commencement of this suit, refused to pay any pew rent and nevertheless continued to occupy pews in the said church for the purpose of attending the English service on Sunday afternoons, yet the petitioners, from respect to the order and injunction of the court, had not interfered with such occupation. That they were not certainly informed whether or not the said the Reverend Frederick W. Geissenhainer consented to relinquish his alleged pastoral charge of the said English congregation or not or whether he had been required to resign and yield up the same by the said persons constituting the so called English Lutheran congregation of St. Matthews Church. That, as the petitioners were informed and believed, the said persons called the English congregation or some of them, including several of the complainants in the suit, had recently agreed with the congregation of a church edifice in Orange street, called St. James Church, that they, the said congregation of the said St. James Church, should transfer their church establishment and worship to the said St. Matthews Church—as well their congregation as their minister, organist, choiristers and other officers—and should form, together with St. Matthews Church, one

consolidated and united congregation to worship in the latter church on Sunday afternoons in the English tongue under the pastoral charge of the Reverend Mr. Martin, who had, for some time past, been the minister of the said St. James Church. Also, that it was contemplated and intended by the said English congregation to admit the said congregation and church establishment of the said St. James Church into St. Matthews Church according to their said arrangement for that purpose on Sunday afternoon then next and regularly thereafter; and that the said congregation of St. James Church were about to shut up and dispose of their said church. That the said congregation of the said St. James Church had not, nor had any of them hired pews or seats in the said St. Matthews Church, but, as the petitioners were informed and believed, designed to enter the said St. Matthews Church and enjoy the use and benefit thereof without paying pew rent or otherwise regarding the rights and interests of the petitioners therein, under color and pretence of being authorized so to do by the injunction aforesaid—whereas, the petitioners respectfully insisted that the said minister and congregation of St. James Church were not nor was any of them entitled to any right or benefit under the said injunction. That, being in full possession of the said St. Matthews Church and having all the officers thereof under their direction and control, it was practicable to resist and prevent the entrance thereunto of any persons not authorized by the injunction to use the same; but that, being bound by such injunction to permit the English congregation to worship therein on Sunday afternoons, and it being unusual to prevent any persons, even casual passers-by, from entering churches on Sunday and participating in divine worship, much difficulty existed in the exercise of such right of exclusion by the petitioners, whilst the said injunction remained in force, except under the express order and sanction of the court: *Prayer*, for a writ of injunction against the complainants, restraining them from using or causing to be used for divine service on Sunday afternoons the said St. Matthews Church by any persons except the alleged English Lutheran congregation mentioned in the

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prior injunction or an order to that effect or for such other or further order, &c.

The affidavits, used in opposition, did not go to contradict the statements in the petition, but they set forth a resolution which passed in the vestry in the year one thousand eight hundred and thirty-nine: "Resolved, That the Lutheran congregation of St. James's having expressed their wish to re-unite themselves with the English congregation of St. Matthews Church, we will endeavor to make such arrangements for that purpose, as far as that can be done for the benefit of our respective congregations." Also, that as the state of things presented a desirable opportunity to build up the English congregation according to the said resolution, the vestry of St. Matthews did invite the pastor of the church of St. James to officiate for them in St. Matthews Church and did also invite his congregation to worship with the English congregation of St. Matthews in the said church on the said occasions, which invitations had been accepted, both by the pastor and by the said congregation—and, consequently, the said congregation intended to worship on the mornings and evenings of each Sunday in their own church and on Sunday afternoons in St. Matthews Church.

Mr. *O'Connor*, in support of the petition.

Mr. *Anthorn*, contra.

THE VICE-CHANCELLOR:—The complainants have a right and are at liberty to employ another minister in the place of the Reverend Mr. Geisenhainer to preach for them in the English language at St. Matthews Church and to invite individuals of any denomination to attend church services there and thus obtain an accession of numbers to their own persuasion and faith and so increase their congregation. But they have no right and cannot be allowed to enter into an agreement with St. James Church—another and distinct corporation, although of the German Lutheran creed—to transfer the minister and congregation of St. James's, as a body corporate, with its church establishment, to St. Mat-

thews, for public worship in the latter place. This would be placing St. Matthews Church under and subject to the church government of another body foreign to its own.

*Order :* That the complainants and each of them be and they are hereby enjoined against bringing in or causing or permitting to be brought into St. Matthews Church in Walker street, the church establishment and corporation of St. James Church, with the officers and church government of St. James Church as a body corporate for the purposes of worship therein when the services are allowed to be in the English tongue. Provided, however, that nothing herein contained shall restrain or prevent the said English corporation from procuring the ministration of any proper clergyman of the German Lutheran persuasion, on Sunday afternoons in the said church or from permitting, in the ordinary and usual manner, the union with such English congregation in divine worship in the said church of any individuals who may, in their individual capacity, become members of the said St. Matthews Church or entitled to pews or seats therein, or who may choose to attend divine worship therein, whether they become members thereof or not.

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CHAMPLIN  
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JOHN DEPEYSTER CHAMPLIN v. ELIZABETH S. CHAMPLIN, *et. al.*

(*Original Bill.*)

ELIZABETH S. CHAMPLIN *et. al.* v. JOHN DEPEYSTER CHAMPLIN.

(*Cross Bill.*)

Although the court may not choose to stay executors and trustees from making sales of real estate authorized in words by a will on a bill filed by a remainder-man entitled to an unascertained share, yet it can secure the purchase-money during a life estate on the principle of *quia timet*. But to do so, all parties in remainder must be before the court, unless the bill be filed by one on behalf of all having similar rights. As must a trustee who has not accounted; as well as a person having a lien upon the complainant's share.

April 18,  
1843.

*Pleading.*  
*Quia timet.*  
*Parties.*  
*Remainder man.*  
*Trustee.*

THE contents of the bill in this case appear sufficiently in the report on the motion made for an injunction: See vol. 3, p. 571.

A cross bill was afterwards filed, which will be found referred to in the opinion of the court. The decision will be understood without further reference to the particulars of the case.

Mr. *H. S. Mackay* and Mr. *W. Sandford*, for John Depeyster Champlin.

Mr. *Warner*, for Elizabeth S. Champlin and others.

June 11,  
1844.

THE VICE-CHANCELLOR :—The object of the original bill is three fold: 1. To restrain the sale of the remaining seventeen lots of land belonging to the estate. 2. To call the defendants to an account for the proceeds of previous sales and other dispositions of the capital of the estate; and, 3. To have any losses of the capital made good and the whole or, at least, that part of it which will belong to the com-

plainant on the death of his mother deposited in court or safely invested or secured.

In respect to the first: It is sufficient to say that, upon the order to show cause in the first instance, the injunction was refused; and upon a bill for a specific performance against one of the purchasers at the sale then made, the court for the trial of impeachment and correction of errors have decided (contrary to the chancellor's views) that the sale was a valid one and the purchaser bound to take the title and complete his purchase. It may be a very different question, however, as regards the purchase money, *i. e.* whether this court is not bound, on the doctrine of *quia timet*, to interpose and see to the security of the fund during the continuance of the life estate: Jeremy's Eq. Jur. 350; 2 Story's Eq. 130.

But, there are objections to such an interference upon the face of the present bill. All the necessary parties are not before the court; nor is the bill framed so as to allow parties to come in under a decree for an account. The other children entitled to interests in remainder are not made defendants; and the bill does not purport to be filed by the complainant for himself and on behalf of those having similar rights and interests. Besides, Mr. Herring, although discharged from the trust, yet, as a late acting trustee, is a necessary party to the taking of an account which would seem to be prerequisite to the securing of any fund in or by the aid of this court. Hamblin would appear, likewise, to be a necessary party as holding the title to or having a lien upon the complainants' share of the estate. And even if the taking an account be not essential to a decree for securing the fund admitted to be now on hand, there is still wanting, as parties to be bound by such decree, the complainants' cotenants in remainder. They have an equal interest with him; and their right to the fund is combined with his claim. There has been no ascertainment of the fund in point of amount—no appropriation or setting apart of a specific amount to be divided into aliquot parts as belonging to certain known owners, so as to give the owner of any one part or share the right to file a bill for his own as a distinct and separate fund, without making the other owners parties. This was held to be admissible in *Smith v. Snow*, 3 Mad.

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C. R. 10, and also in *Hutchinson v. Townsend*, 2 Keen's R. 676. But the facts of the present case do not warrant such a departure from the rule which requires that all persons having an interest, although remote, in the same subject matter, must be made parties to the suit or the bill must be so framed as to give them an opportunity to come in and be made parties.

As the present bill is defective in the particulars to which I have alluded, no decree can be made upon it, however proper it may be for the court to interfere *quia timet*. It must be dismissed, with costs; but without prejudice to the complainants' filing a new bill, if he shall be so advised, to have an account of the capital of the estate and security for its forthcoming on the death of the mother.

Next, as to the cross-bill. The testimony fails to prove that any real damage was sustained in the sale of the seventeen lots of land by the steps taken on the part of the defendant to this cross-bill. The use he made of the order of this court on that occasion was rather an abuse of such order, but it does not appear to have been attended with any very injurious consequences. Mr. Selden's prompt and judicious explanation appears to have counteracted the design, so that the sale proceeded and the lots brought fair prices. No witness has positively stated that the lots would have sold for a dollar more if the defendant had not interfered. There is no ground, therefore, to charge the defendant with actually depreciating the price of the lots or causing them to be sold for less than they would otherwise have brought. If, by his subsequent conduct, the purchasers have been deterred from a completion of their contracts, so that a loss in that way has been or shall be produced, I will not say that a responsibility does not rest upon him to make good such loss to the estate. But, it does not yet appear that a loss of that sort has been sustained. *Non constat* but the purchasers have been or may be compelled specifically to perform. A decision to that effect in one case has been shown to me. It will be time enough to consider, when the estate comes to be divided among the children or grand children of the tenant for life, whether the present defendant shall make good prices at which the lots were struck off to bidders at the sale

in question, provided it shall appear that his interference has prevented such sales from being carried into effect and the property shall not afterwards bring as much money. I cannot undertake to anticipate what may be the result; and it must remain until the facts are made known. If all the sales should be consummated or the remaining lots should sell for as much hereafter, there will be no loss to charge upon the defendant, however improper his conduct, if improper it should be deemed.

Another claim is made by the cross-bill: that the defendant is largely indebted to the estate for monies advanced by the executors or some of them and which ought to be set off and charged against his interest in the estate. The testimony of Mr. Herring proves an advance, by the executors, of one thousand dollars to set him up in business when he was only nineteen years of age. This cannot now be decreed as a debt against him. He has a right to take advantage of his infancy and of the statute of limitations as a bar to the claim as a legal demand. If it can be regarded in the light of an advancement out of or on account of his distributive share of the estate, it will be in season to attend to it when the estate comes to be divided and the accounts settled and adjusted preparatory to the division among the remaindermen.

There is nothing else in this bill to be considered; and it must be dismissed, with costs; but without prejudice to any claim which may be made upon John Depeyster Champlin or his share of the estate for advancement or anything in that light; and also without prejudice to any claim upon him to make good the prices at which lots were struck off to purchasers if it shall be made to appear that his interference prevented the fulfilment of the contracts of sale or of any of them.

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WHEELWRIGHT v. LOOMER, DEPEYSTER, Administrator,
&c. of CLENDENING, deceased, *et al.*
(Original Bill.)

DEPEYSTER, Administrator, &c. v. WHEELWRIGHT.
(Cross Suit.)

The recording of a second mortgage is not constructive notice to a mortgagee of a first registered mortgage.

Although there may be a second mortgagee, yet a first mortgagee, who has no knowledge or information of it, does not, by releasing a part, affect his rights over the balance of the premises.

Where a husband mortgages his own property for his own debt and, at the same time, the wife joins her husband in mortgaging to the same mortgagee her property for the same debt; and, afterwards, the mortgagee buys the husband's mortgaged premises and pays him the purchase money (not crediting it on the mortgage) and thereby the husband's mortgage merges, the mortgagee, in an attempt to foreclose on the wife's property, will have to credit the amount at which he bought the husband's property. This is held on the ground that the wife is a surety and that the creditor must first resort to the primary fund and relieve the surety as far as possible and can do no act to impair the benefit of substitution without express consent. And where, in such a case, a mortgagee (holding two such mortgages,) had—when calculating the amount of purchase of the husband's premises and otherwise from the mortgages generally—been satisfied, but filed a bill to foreclose and sell the wife's property, insisting on a balance and that the husband's mortgage was merged and that the matter of purchase was not to be taken into account; and another, after-mortgagee, who had advanced money to the heir of the wife, filed a cross-bill; *it was held*, that the mortgagee filing the foreclosure bill took nothing and should be dismissed, paying costs; and that, in the cross-suit, a sale should be had to satisfy the mortgagee filing such cross-bill.

BILL AND CROSS-BILL.

April 27,
1843.

Mortga-
gor and
Mortga-
gee.
Husband
and wife.

On the first day of May, one thousand eight hundred and thirty-seven, Otis Loomer and Jane T. his wife made and executed to Paul Spafford, Thomas Tileston and the complainant Benjamin Wheelwright a mortgage on lots known as Nos. 187 and 189, Pearl street, New York, and Nos. 1, 2, 3, 5 and 7 Cedar street, in the same city, for securing the payment of a bond for twenty-five thousand dollars and interest. Recorded the third day of May, one

thousand eight hundred and thirty-seven. These premises were the individual property of the defendant Otis Loomer.

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On the same day, the said Loomer and Jane T. his wife (formerly James T. Whittemore) executed another mortgage to the same parties of all the undivided tenth part of all the real estate of which Samuel Whittemore, the father of the said Jane T. Loomer, had died seized—the said tenth being her share of the said estate as an heiress at law. Recorded simultaneously with the other mortgage.

*Surety.
Wife's estate mort-
gaged for
husband's
debt.*

The debts secured by both the mortgages were the individual debts of the husband Otis Loomer.

Among the property of the said Samuel Whittemore deceased and covered by the last mentioned mortgage, was a vacant lot on the sixth avenue in the city of New York.

At the time this last mentioned mortgage (embracing a share in the Whittemore property) was executed, a partition suit was going on for its division among the heirs of Samuel Whittemore; but, before it was ended, Jane T., the wife of the said Otis Loomer, died; and the commissioners in partition attached her share to her son Charles W. Loomer, who was then an infant.

The aforesaid mortgages were given, in fact, to secure respective debts due to the said Spofford and Tileston and to the complainant Wheelwright—the amount due to the two former being about twelve thousand dollars and to the latter about eight thousand two hundred dollars and neither party having any interest in the claim of the other.

On the twelfth day of February, one thousand eight hundred and thirty-nine, the said Spofford, Tileston and the complainant Wheelwright released a certain part of the premises embraced by the mortgage of the Whittemore property, but such release was not acknowledged until the sixteenth day of January, one thousand eight hundred and forty, nor recorded until two days afterwards.

In the month of February, one thousand eight hundred and thirty-nine, the said Otis Loomer, as special guardian of his said infant son Charles W. Loomer and in pursuance of an order of the court of chancery, conveyed certain pieces of the property set apart to the said Charles W. in

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the partition suit, in full satisfaction and discharge of the interest of the said Spofford and Tileston in the said bonds and mortgages. And the said Spofford and Tileston, in December one thousand eight hundred and forty, released and quit claimed to the said Otis Loomer all their own claims, but without prejudice to the rights of the said complainant Wheelwright.

In the month of August, one thousand eight hundred and thirty-eight, the said Otis Loomer, as the special guardian of his son Charles W., applied for leave to mortgage the lot of ground on the sixth avenue and so that the same might be improved and which was allowed. In conformity with this, he did, on the tenth day of July one thousand eight hundred and thirty-nine, execute a bond and mortgage to the defendant in the original suit (and the complainant in a cross-suit) Frederick De Peyster as administrator, &c. of John Clendenning, deceased, for securing three thousand dollars and interest. This mortgage was recorded on the nineteenth day of July one thousand eight hundred and thirty-nine.

On the sixth of February one thousand eight hundred and forty, the said Benjamin F. Wheelwright bought of the said Otis Loomer and had conveyed to him the premises on Pearl and Cedar streets embraced by the first mentioned mortgage, whereby, as the pleadings of the said Wheelwright admitted, the said mortgage was merged in the estate in fee and was no longer a valid and subsisting lien upon the said premises.

The complainant now filed a bill to foreclose the mortgage heretofore given to him and Spofford and Tileston by Loomer and wife on her share of her father's property. He charged that the mortgage made to the said Frederick De Peyster, administrator, &c. was a subsequent security; and in his prayer asked for foreclosure and sale, but he excepted the lot on the sixth avenue embraced by the mortgage to the said De Peyster, unless the mortgaged premises should be insufficient to pay the amount which should, then, be due to the complainant with principal and interest and in that case, he asked that the said lot should be sold.

The defendant, Frederick De Peyster, as such adminis-

trator of the estate of Clendenning, deceased, filed a cross-bill, setting forth *inter alia*, that he had no notice (which was admitted) of the release of part of the premises as before stated at the time the mortgage was made to him; that, at the time the first mentioned mortgage to Spofford, Tileston and Wheelwright was executed, the lot embraced by the mortgage held by him, De Peyster, was vacant and unimproved, but had since been built upon. He charged that Spofford, Tileston and the complainant Wheelwright or some or one of them had information of the appointment of Otis Loomer as special guardian, &c. and had also knowledge of De Peyster's loan. The utter insolvency of the said Otis Loomer was charged; and, also, that the said Wheelwright was now seeking to obtain a decree for the sale of the lot embraced by his, De Peyster's, mortgage, although he knew that in equity he was not entitled thereto. *Prayer* for discovery; and, that the said lot might be exempted from all liability on account of the mortgage held by Wheelwright; but if the latter were still a lien, then, that the value of premises released should be credited and that the said Wheelwright foreclose both his mortgages; and, in case of insufficiency from those sources, then, that the value of the improvements on the sixth avenue lot might be ascertained; and that, out of the proceeds, he might have and receive the value thereof, before Wheelwright, &c.

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Mr. A. W. Bradford, for the complainant Benjamin F. Wheelwright. The controversy is narrowed down to the lot covered by the Depeyster mortgage.

I. The first question is, as to the effect of the widow's release of dower. It was a release to the heir who owned the fee and not to Mr. Depeyster. Her intention cannot be proved by parol. Its legal effect and operation can only be looked to. It cannot give Depeyster a prior equity.

II. No priority is obtained by reason of the money being spent in improvements, unless Wheelwright had intentionally concealed all knowledge of his lien. Wheelwright knew nothing of the loan about being made by Depeyster. The testimony shows he had no knowledge of Depeyster's mort-

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gage until after his original bill was filed. Depeyster was made a party only by amendment.

III. The complainant's mortgage is prior both in date and registry. Depeyster had constructive notice of it.

IV. The recording of the Depeyster mortgage being a second mortgage is not constructive notice to the first mortgagee. The statute does not make it so. *Frost v. Beekman*, 1 J. C. R. 300. It is only notice to subsequent incumbrancers. And see *Cheesebrough v. Willard*, 1 J. C. R. 409. The case of *Stevens v. Cooper*, Ib. 425, is not against my client. It cannot be applied to the present case. Possession is constructive notice: *Gouverneur v. Lynch*, 2 Paige's C. R. 300. The case of *Neimcewicz v. Gahn*, 3 Ib. 614, contains the principle as to what will discharge a surety. The doctrine as to notice, to be found in *James v. Morey*, 2 Cowen's R. 446, is now incorporated in the registry act. Wheelwright's release has no effect against him.

V. Wheelwright's mortgage has not been merged or satisfied. Merger is a matter of law and not of fact. And see *Guion v. Knapp*, 6 Paige's C. R. 35;(a) and *Mills-paugh v. McBride*, 7 Ib. 509. The intermediate mortgage of W. T. Whittemore prevented a merger.

VI. The case of *Cooper v. Whitney*, 3 Hill's N. Y. Rep. 95, is applicable. The equity of redemption acquired may be held still in mortgage by the mortgagee. The doctrine in the case of *James v. Morey*, as it appears in 6 J. C. R. 420, was overruled in the court of errors, (2 Cowen's R. 246.) There is no expression apparent of Wheelwright's that goes to a declaration of merger. The property was and always has been insufficient to pay the prior mortgages thereon; and hence, no actual satisfaction to Wheelwright.

Mr. Bradford also referred to *Starr v. Ellis*, 6 J. C. R. 395; *Brinckerhoff v. Lansing*, 4 Ib. 65, 70; *Tice v. Annin*, 2 Ib. 125; *Skeel v. Spraker*, 8 Paige's C. R. 196, and *Spencer v. The Executors of Harford*, 4 Wendell's R. 381.

Mr. *Murray Hoffman*, for the infant defendant, Loomer. Two prominent facts appear. 1. The debt or consideration

(a) See this case explained in *Stuyvesant v. Hall*, 2 Barbour's Ch. Rep. 151.

of the mortgage was the debt of the husband for which the wife's estate was mortgaged and collateral to a mortgage of the husband's estate. 2. Wheelwright knew he was taking the security of the wife's inherited estate. *Neimcewicz v. Gahn*, 3 Paige, 614, and cases there cited are relied on to show that the relation of principal and surety exists. The creditor is bound to resort to the property of the husband before he goes against the wife or her property as the security. And see *Hayes v. Ward*, 4 J. C. R. 129; *Eddy v. Traver*, 6 Paige's C. R. 521.

The case of *Lord Harborton v. Bennett*, Beatty 386, goes on all fours with the one now before the court.(a)

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(a) As Beatty's Reports remain unfinished and are scarce, the case of *Lord Harborton v. Bennett*, is here given. The bill filed in 1820 to foreclose a mortgage, stated that the plaintiff, by indenture dated the 30th of September, 1808, granted to the defendant Bennett and his heirs the demesne and lands of Newbury at the annual rent of £786 14s; that Bennett covenanted to pay the rent and keep the premises in repair. On the 3d of January, 1809, Thomas Wildridge, whose executors are defendants, executed the mortgage to the plaintiff to secure the performance of the covenants by Bennett. That Bennett had suffered a large arrear of rent to grow due and had permitted the premises to fall into a ruinous state. The bill, therefore, prayed an account of what was due by Bennett for rent and what sum would be required to put the premises in repair; for payment, foreclosure and sale. A deed bearing date the 6th of March 1823, was proved at the hearing on the part of the plaintiff, whereby the defendant Bennett had, in consideration of ten shillings, re-conveyed to the plaintiff the premises granted to him by the indenture of the 30th September, 1808.

THE LORD-CHANCELLOR:—This bill was filed by Lord Harborton against the representatives of Thomas Wildridge and against other persons interested in the administration of his estate, for the purpose of obtaining payment of a sum claimed to be due on a mortgage, executed by Wildridge, and dated the 3d of January, 1809. No money was due to Lord Harborton from Wildridge, but the deed was executed to Lord Harborton, to secure to him the due payment of rent, and performance of covenants, contained in a deed bearing date the 30th September, 1808, whereby Lord Harborton granted to a Mr. Bennett and his heirs, a mansion house and land in the county of Kildare, at the reserved rent of £786 4s. The grantee paid a sum of £4000 for the purchase of the timber then standing on the estate, and covenanted to pay the rent, and to keep the premises in repair. Wildridge, as surety for Bennett, executed the deed of mortgage for £3,500, conditioned to be void if Bennett should duly pay the rent and perform the covenants. Bennett having suffered the rent to run in arrear, and the premises to be dilapidated, Lord Harborton filed this bill, to have satisfaction made him out of the mortgaged estate. According to the relation the parties stood in at the filing of the bill, the relief sought by the plaintiff was of course. He was entitled



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Then, as to the effect of the agreement of the sixth day of February, 1840, which, it is said, constitutes the equity of redemption still a mortgage in the hands of Wheelwright. The reservation therein is perfectly nugatory as against the wife. It does not operate as a mortgage and can have no such effect. It gives no right to redeem; and the estate is absolute without a foreclosure. It may amount to a conditional sale and give a right to an account for rents. We do not contest the doctrine of merger. Here has been a merger. An expressed intention is necessary to prevent it. Wheelwright's bill should be dismissed, with costs to the infant; and he should be compelled, if possible, to refund to the infant what he has already improperly received of his estate.

Mr. *E. H. Owen*, for Depeyster, referred, on the point of

to have the account taken, and the sums due to him raised by sale of the estate pledged to him by Wildridge; but then the representatives of Wildridge, as sureties for Bennett, would have a right to resort to the estate pledged to Lord Harborton and to require Lord Harborton to arm them with all his rights and remedies against Bennett and the estate for their reimbursement, so far as such rights and remedies could be transferred to them, consistently with the preservation of his own paramount title over the estate, for payment of his future rent and performance of covenants. This right of the surety who pays the debt of another, to the benefit of subsidiary securities belonging to the principal, is the common equity of the court: *Parsons v. Briddock*, 2 Vern. 606; *Wright v. Morley*, 11 Ves. 12; *Copis v. Middleton*, 1 Turn. 224: but these several rights and reciprocal remedies have been extinguished by Lord Harborton, whose act has deprived the representatives of Wildridge of their remedy over. As part of his own evidence, he has proved a deed dated the 6th March, 1823, whereby Bennett, in consideration of ten shillings, re-conveyed the estate to him and his heirs. That subsidiary bond, therefore, which Wildridge's representatives were entitled to resort to for indemnity, has been taken from them by Lord Harborton, and for that reason I think Lord Harborton is not entitled to have the relief he prays against the estate of Wildridge. It has been said that the estate is not worth the annual reserved rent, and, therefore, that the reconveyance to Lord Harborton was no detriment to the representatives of Wildridge; of that Lord Harborton had no right to judge for them. It has in other cases been argued, that a creditor, giving time to the principal, may have benefited the surety, and therefore his liability ought not to be affected: but it has always been answered, that the creditor had no right to judge for the surety what was best for him. I am, therefore, of opinion that this bill must be dismissed; but upon the whole, I think it must be dismissed without costs, except as to the attorney-general, whose costs the plaintiff must pay.

notice to *Jewett v. Palmer*, 7 J. C. R. 65; *Guion v. Knapp*, 1843.  
6 Paige's C. R. 35; *Patty v. Pease*, 8 Ib. 277; and as to pri-  
ority to 1 Story's Equity, 483, 486, (§ 1237, 1239;). 2 Ib. 391.

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THE VICE-CHANCELLOR:—Although Mr. Depeyster had not notice in fact of the existence of Wheelwright's mortgage, yet he had notice in law, from the circumstance of its prior registry, and must be deemed to have taken his mortgage, at the time, as the subordinate incumbrance upon the lot in question; and unless something has occurred since the giving of the Depeyster mortgage to displace the priority and preference which belonged to Mr. Wheelwright's security, such priority must still be preserved.

If the question were between these two mortgagees only and the rights of no other person were involved, I should think the facts would not warrant the postponement of Mr. Wheelwright's claim to that of Mr. Depeyster. The former had no actual notice of the mortgage of the latter and nothing had come to his mind to put him on inquiry; and the registry of the second mortgage upon the same premises was not constructive notice to a first mortgagee: *Talmage, President v. Wilgers*, Ass't. V. C. Hoffman, MS.(a) A release of

(a) The reporter has been favored by Assistant Vice Chancellor Hoffman with his opinion in this case.

*Thomas G. Talmage, President of the North American Trust and Banking Company v. Nathaniel Wilgers, Thomas G. Sherwood and others.* The facts of the case were these: The defendant Wilgers, together with one Burton, mortgaged certain lots marked 18, 19, and 13, in Buffalo, on the thirteenth day of March, 1832, to one Johnson. The mortgage was duly recorded on the twenty-eighth day of the same month of March. Johnson assigned the securities to the complainant on the twenty-second of September, 1838, (by assignment) recorded the eighth day of October, 1838. The consideration was \$1,950. Burton, the co-mortgagor, conveyed all his interest to Wilgers on the twentieth of April, 1835. Wilgers and wife conveyed lot No. 18, by warranty-deed to one Prince in consideration of \$2,000. The deed was recorded on the twenty-fourth of April, 1835. Prince paid \$500 down and gave his bond and mortgage for the balance—and on which it was alleged had been paid the sum of \$445 65. That lot. No. 18, was vested in the defendant Sherwood, as assignee of Prince, for the benefit of creditors, by a conveyance dated the third of May, 1837. On the seventeenth day of December, 1836, Johnson, the mortgagee, released lot No. 13 from the lien of the mortgage, which release was recorded. The consideration for the release

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a part of the mortgaged premises will not, under such circumstances, impair the right to go against other parts, al-

did not appear. It was supposed by counsel to be nominal merely. The cause had been heard in July term, 1841, and an opinion expressed by his honor conformable to the ultimate decision. A re-argument was, however, requested and had.

*The Assistant Vice-Chancellor*:—I have been much aided by a re-argument of this cause, which has excited considerable interest in the profession in New York, and involves very important practical consequences. Certainly it has been done great justice to upon the re-argument.

I have also taken pains to consult with several experienced and judicious members of the profession, whose business particularly calls them to the passing of titles, loaning of money upon mortgages, and leads them to judge soundly of the effect of legal decisions upon the current business of the community.

The decision of this case depends upon the question whether the decision in *Guion v. Knapp*, (6 Paige, 35) applies. In that case, the Chancellor decided that if the mortgagee releases one of several lots bound by his mortgage, with knowledge that the mortgagor had aliened another of such lots, he would be compelled to allow, upon the mortgage, the value of the lot released. The mortgagee there, when he released, had actual notice or strong constructive notice of the prior conveyance of one of the parcels.

It was also decided that, where the purchaser of one of the mortgaged parcels had not put his deed upon record, and there was no actual notice in the mortgage nor anything leading to an inquiry, the rule did not apply. Only the sum actually received upon the release was to be credited.

The Chancellor says:—"The conscience of the party who holds the incumbrance is not affected, unless he is informed of the existence of the facts upon which the equitable right depends or has sufficient notice of the probable existence of the right to make it his duty to inquire whether such equitable right does not in fact exist."

But in the present case, there is neither express notice nor any facts proven to have come to the party's knowledge from which notice is to be inferred. The question is, nakedly, whether the record of the deed is such constructive notice as to be binding upon the mortgagee? A purchaser of one of the several lots covered by a mortgage has a right to require the sale in the first instance of all the lots remaining subject to be sold before his own is resorted to. If the mortgagor has successively conveyed separate parcels, the sale is to take place in the inverse order of alienation. This is a right between the purchaser in succession and the mortgagor. The mortgagor as to the property retained by him is the principal debtor and the purchasers are sureties, the first of them in point of time being the last to be resorted to, and where notice of a sale of one lot is brought home to a mortgagee, he is not at liberty to do any thing which shall impair the right of having the other lots first applied.

Two instances have been mentioned to me of large estates sold some years ago in New York and one in Albany, in which there was a collateral agreement to release, upon receiving a proportion of the purchase money. This has been done to such an extent that if the lots previously aliened by the

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though aliened or covered by a second mortgage, where the first mortgagee neither knew nor had any reason to suppose

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mortgagor without a release are to be resorted to only after crediting on the mortgage the value of such released lots at the time, nothing or little will be due and the mortgagee will not receive in fact near the amount of his debt. It is true this result will arise chiefly from the fact of the very high prices of property at the time of such releases. Another case has been stated to me, and it is one which may, in substance, occur frequently. Four lots were mortgaged of equal value. There was an agreement to release two when a house was erected on a third. The fourth lot was conveyed by the mortgagor and his deed recorded, but there was no notice given to the mortgagee. The building being completed, the release of the two lots was executed; afterwards the house burned down uninsured. It is to be remembered that it is not the duty of the mortgagee to keep property insured. He cannot be allowed for the premium (Hopkins Rep.) In the case stated, if the mortgagee must allow the value of the released lots, his debt will be more than three-fourths discharged, without his receiving a cent and the remaining lot will pay less than a fourth of the sum due.

In some instances, also, it is made part of the mortgage provisions that a release shall be executed upon payment of a given sum or proportion. Here, I apprehend, no difficulty can arise. The purchaser would, at least, have no claim for the stipulated amount to be credited in such case.

Again, it may be noticed, that, in New York, at least, as I am informed by many of the best and most prudent practitioners, prior to the decision in *Guion v. Knapp* releases were granted without hesitation, often voluntarily, for the advantage of the mortgagor where the mortgagee saw that his security remained ample and without the least care as to whether there had been prior conveyances or not.

Two of these gentlemen remarked that, as a matter of prudence, they have subsequently advised their clients not to release without a search of the records or satisfaction that there were no prior conveyances.

It should also be considered whether any rule which embarrasses transactions between a mortgagee and mortgagor for the extrication of a portion of the incumbered property, as suits his convenience, will not be greatly prejudicial to the mortgagor.

If the mortgagee cannot release without a search and if he find prior conveyances of any portion and runs the risk of having the lot he purposes to release charged to him hereafter at a valuation to be fixed by witnesses and he will, in common caution, be very reluctant to release at all or only on such terms as will prevent any advantage to the mortgagor or upon obtaining the ratification of the alienee.

Now, all the considerations are, of course, of no avail, if the law is settled. But, certainly, the case before the chancellor does not settle it. The inference has been drawn by cautious counsel from his language and nothing more; and, where the point is not settled, the considerations of convenience, of long understood practice and the common assent of the profession are entitled, upon a dubious question, to great weight.

It is said that before the mortgagee releases, he may search the records. The reply is, that it should be as much the duty of the grantee who gets a sub-

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sequent right to give him actual notice of his purchase and thus put him on his guard. It strikes me that, on this subject, the equities are balanced. There is no more conscientious obligation upon the one than upon the other. The alienee knows of the mortgage or is bound to know of it. He can give notice to the mortgagee or any assignee who shall appear on the record.

Then, in my opinion, the strict law must decide the point.

It has been said that a duly registered deed is notice to all the world.

This proposition must be much qualified.

The language of the statute is, that "every conveyance not recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate or any portion thereof whose conveyance shall be first duly recorded."

Thus, the purchaser must not only be one in good faith and for consideration, but his deed must be first recorded to prevail against a prior deed. This provision of the statute involves another proposition. If the unrecorded deed is void as to such a subsequent purchaser, it is good as to all except such. It is exclusively persons answering this description that are protected by and are within the registration act. Hence it is such persons only who are affected by that act.

The proposition appears to me to be that subsequent purchasers are alone benefitted by the registration act, so as to take preference of an unrecorded deed, and on the other side subsequent purchasers are alone affected by the statute, so as to be bound by a registered deed. To all other persons, other rules of law apply than those furnished by this statute. Now, the definition of the term purchaser in the statute is as broad as possible, being "every one to whom any estate or interest in real estate shall be conveyed for a valuable consideration, and every assignee of a mortgage, lease or conditional estate."

It cannot be urged that a mortgagee, releasing one of several lots in his mortgage, is a subsequent purchaser. He deals with the property, it is true, by relinquishing part of what he had before purchased. He acquires nothing of a new right in the property in any form or upon any interpretation of the term purchaser.

In the case of *Jackson v. Post*, 15 Wendell, 594, it was established that if a *bona fide* conveyance is made to A, who neglects to record his deed, and the grantor then conveys to B, whose deed is recorded, yet a grantee of B cannot hold the land if the deed to A is recorded prior to the recording of his own.

This case arose before the revised statutes and the language of the latter would even more strongly support it than that of the old act.

I may observe that the practice of a large body of conveyancers had not been consistent with this decision. If, in the above case, a conveyancer found a deed from the owner, with whom he begins, to B duly recorded and unexceptionable, he would have ceased to search against such owner and would have continued it as to B only. But this case shows that such a course would be unsafe. However, it is apparent that this decision is in conformity with the strict letter of the statute. The subsequent purchaser is not fully within the act to be protected until he has recorded his deed, although

*Guion v. Knapp*, 6 Paige's C. R. 35, contains the true doctrine on this subject.

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in every other respect his purchase is in good faith and for a valuable consideration.

It appears to me that the view of these acts taken by the Irish courts is the sound one. They are considered as avoiding the unrecorded conveyance in favor of the subsequent one or giving the latter a preference by force of their positive provisions, not upon the doctrine of notice.

A late writer (Molesworth on Registration) thus states the doctrines. I have looked into all the cases cited by him:—"It appears by observations made in sections 4, 5 and 7, that a conveyance, being registered, produces upon purchasers under conveyances subsequent to such registration an effect of postponement similar to that of notice.

Even covenants purporting to charge any property which the covenantor might afterwards acquire, being registered, have been preferred to purchasers without notice of such after acquired property: *Gubbins v. Gubbins*, Drury & Walsh, 130, in notes. But registration only gives priority, it does not, in itself, operate as notice: *Bushell v. Bushell*, 1 S. & St. 90; *Latouche v. Dunsany*, Ib. 137; *Underwood v. Courtoun*, 2 Ib. 41; *Stuart v. Ferguson*, Hayes, 452; and see *Hine v. Dodd*, 2 Atk. 275; the registration of a deed does not operate upon all persons dealing with the property, as notice of its existence, nor even upon those whose conveyances it postpones, as notice of the contents of the memorial: *Burshee v. Burshee*, 1 S. & St. 103. Thus, under the English acts, a purchaser may, by procuring the assignment of outstanding legal estates, postpone others whose conveyances are prior in execution and registry to his, the registry not operating as notice: *Wightson v. Hudson*, 2 Eq. Ca. Abr. 609; *Bedford v. Bachus*, Ib. 615; *Cater v. Cooley*, 1 Cox, 182, though even constructive notice would prevent his doing so: *Morecock v. Dickens*, Amb. 678.

But, though registration does not, itself, operate as notice, it may, coupled with other circumstances, be evidence of notice. If it is proved that a person has, in fact, searched the registry by himself or his agent, it will constitute *prima facie* evidence that he has notice of all deeds appearing upon it: *Burshee v. Burshee*, 1 S. & St. 103; *Hodgson v. Drane*, 2 S. & St. 221; 2 Pow. on Mortg. 631, in notes. So, though the search be made by the registry officers, as they will be presumed to have done their duty, but if the search is proven to have been limited, the presumption of notice is limited accordingly: *Hodgson v. Deane*, *ut supra*."

The case then comes to this. Is a mortgagee, prior to executing a release of one portion of the mortgaged premises bound to search the records, as to any conveyances by the mortgagor subsequent to his own mortgage. If he is a subsequent purchaser, he is bound to bear the same consequences as if actually apprised of a prior conveyance. If he is not a subsequent purchaser, he is not bound and the alienee must protect his rights by positive notice. Now, I take a purchaser to mean a party who acquires some new original or additional right in property; and, I can, by no means, accede to the ingenious argument of counsel, that a new right is acquired in the remaining lots by the release of one. The mortgage was as much a lien upon each lot and every part of each lot as upon the whole.

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 DEFFYSTER.

But, the infant defendant, Charles W. Loomer, has rights which are to be attended to in this case. The lot now in question, among other lots mortgaged to Benjamin F. Wheelwright, was the property of the wife of the mortgagor and the mortgage was given for a debt owing by the husband. About this fact there is no dispute. The mortgage of the wife's property was collateral to the mortgage of the husband's property on Pearl and Cedar streets, in order to secure the same general indebtedness. The wife, then, in respect to her property, is regarded as the surety of her husband: *Niemcewicz v. Gahn*, 3 Paige's C. R. 614; S. C. 11 Wend. R. 312; and was entitled to all the equitable rights and privileges of a surety. Among these are the following: that the creditor shall first resort to the primary fund, where, as in this case, there are two, for the payment of his debt so as to relieve, as far as possible, the property of the surety and that the creditor shall do no act, without the express consent of the surety, to impair the benefit of a substitution to which the surety may be entitled. These are familiar rules in this court: *Cheesebrough v. Millard*, 1 J. C. R. 409; *Stevens v. Cooper*, Ib. 425; *Hayes v. Ward*, 4 Ib. 123; *Eddy v. Traver*, 6 Paige's C. R. 521.

Now, Mr. Wheelwright has acted in disregard of these principles in relation to the Pearl street and Cedar street lots. Instead of resorting to these pieces of property as the primary fund for payment of his mortgage debt as far as they would go, he becomes the purchaser of the equity of redemption from the mortgagor and pays him the value in money, not taking it in part payment or crediting the amount on the bond and mortgage. This he cannot be allowed to do to the prejudice of the surety. By becoming the purcha-

The result, in my opinion, is, that the record of the conveyance of lot 18 was not constructive notice to the mortgagee when the release of lot No. 13 was made; and, as no actual notice is suggested, the mortgagee is not liable for the value of that lot.

If I had taken an opposite view of the case, it would have been necessary to examine a question which, I think, would fairly arise, viz. whether the complainant would not be entitled to some equity from only \$500 being paid on the purchase of lot 18 and a bond and mortgage given for the residue. The master, in computing the amount due, must ascertain what was paid upon the release of lot No. 13 and credit that amount.

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ser, the equitable merged in the legal estate which he acquired in that portion of the mortgaged premises; and he insists, in his answer to the cross-bill, that such is the effect of the transaction between him and his mortgagor. And as between him and the surety in the mortgage he can have no reason to complain if the purchase is to be held a satisfaction *pro tanto* of the mortgage debt, because he has thereby undertaken to deprive the surety of the right to compel him to go against that property as the primary fund or, in the event of the surety's paying the debt, to put it out of his power to resort to it as a subsisting security to which he might wish to be subrogated.

Nor do I see that the mortgagee can have any reason to complain, if the price at which he has taken the property, in his purchase of the absolute title, should be adopted as the extent of the relief to which the surety is entitled from the mortgage debt. The price was eight thousand three hundred and fifty dollars; and if from that sum be deducted one thousand dollars paid by him to extinguish a subsequent mortgage and five hundred and fourteen dollars for taxes, there is still six thousand eight hundred and thirty-six dollars which the infant defendant has a right to avail himself of in exoneration of so much of the mortgage debt on his property; and this exceeds the balance of four thousand seven hundred and eighteen dollars and forty-five cents which Mr. Wheelwright now claims to be due.

I must decree the lot in question to be discharged from any further lien or incumbrance of Mr. Wheelwright's mortgage, leaving it to be sold to satisfy Mr. Depeyster's mortgage under the ordinary decree to be entered in the suit upon his cross-bill; and further that the said Wheelwright pay to the complainant in the cross-bill, (Depeyster) and to the guardian *ad litem* of the infant defendant in that suit their taxable costs occasioned by this litigation, beyond what would have been incurred in an ordinary uncontested proceeding to obtain a foreclosure of the equity of redemption and a sale of the lot.



1843.

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CURTIS  
v.  
LEAVITT.

CURTIS and others, Trustees, &c. v. LEAVITT, Receiver,  
&c. and others.

—  
A bill cannot be so amended in its prayer as to change its object.

May 1,  
1843.

—  
*Practice.*  
*Bill.*  
*Amend-*  
*ment.*  
*Pleading.*

ON petition for leave to amend the bill which had been filed, under oath, to establish the validity of assignments or trust conveyances made to the complainants by the Directors of the North American Trust and Banking Company, an association under the general banking law, which had now become insolvent and over the assets of which the defendant David Leavitt was appointed receiver. The complainants in their bill charged the said receiver, the defendant David Leavitt, with making a false and inequitable claim to the assigned property, with subjecting the complainants, as trustees, to great delay and expense, as well as endangering the trust funds by resisting their claim in numerous suits which they had been obliged to bring to enforce payment of bonds and mortgages assigned to them and in which suits they had made the said Leavitt a defendant. And in their bill they had asked to have their rights settled in this suit and the trusts of the assignment to them declared valid; and that a receiver of a considerable portion of the property should be appointed and for an injunction against the said David Leavitt, to restrain him from interfering with the trust property or resisting their claims in the foreclosure suits.

The complainants' petition set forth that no answers had been put in; that a special receiver had been appointed, who had had the aforesaid bonds and mortgages assigned to him; that, now, the prosecution of the said suit for any other purpose than the appointment of the said special receiver had become comparatively unimportant, especially as the complainants, petitioners, were informed and believed that the defendant, David Leavitt, as general receiver aforesaid, had prepared and was about to file his bill of complaint for the purpose of setting aside the trust conveyance

mentioned in the said bill ; that the petitioners were anxious to avoid the additional expense and trouble which would be occasioned by the said receiver's bill assuming the form of a cross-bill ; and, therefore, they proposed amendments, (which were annexed to the bill,) in order that the litigation, as to the said trust conveyances, might be simplified and rendered less vexatious and expensive by limiting their said bill to the sole object of the appointment of the said special receiver and thereby rendering any answer and any further litigation therein unnecessary.

All the proposed amendments had reference to the prayer of the bill—and, in making them, it was suggested to strike out as well as to insert matter.

It appeared that, at the time the original bill was filed, the complainants were aware that the general receiver, David Leavitt, intended to file a bill to set aside the assignments or trust conveyances as unauthorized and illegal. He also had put in his answer a short time after the petition to amend had been served.

*Mr. W. C. Noyes* and *Mr. B. F. Butler*, for the complainants.

*Mr. Titus* and *Mr. G. Wood*, for the defendant David Leavitt.

*Mr. C. C. King*, for the defendants Messrs. Palmers, McKillop, Dent & Co.

THE VICE-CHANCELLOR :—I cannot perceive the necessity or propriety of granting leave to the complainants to amend their bill in the particulars proposed.

It is true, the proposed amendments do not go to change or alter any statement or allegation of fact in the bill ; as they relate solely to its prayer. But if they were to be allowed, they would materially change the objects of the bill, restricting it to the appointment of a special receiver and dropping the other and principal object which the bill seems to have in view, namely, that of confirming what is called the million and first half million trust in the complainants,

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CURTIS  
v.  
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Oct. 7.

1843.

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LEAVITT.

and establishing their title to the bonds and mortgages, so that they might proceed with the foreclosure suits without impediment from the defendant David Leavitt. The propriety of filing the bill for all these purposes must be left to the hearing; and I consider that the bill should, therefore, remain as when filed. The costs of the suit may be matter of some importance; and the question on that subject ought not to be embarrassed by any change in the prayer and object of the bill. If, when filed, it was improper in any one aspect or feature, the complainants must not be allowed to escape from the consequences of any such impropriety by striking out and changing its features or object, especially after answers have been interposed. Besides, the defendant Leavitt has filed a cross-bill or a bill in the nature of a cross-bill, containing upwards of eleven hundred folios and very voluminous schedules in addition, in which is set out the prayer and objects of the present bill. To amend the one, would be productive of some discrepancy in the other; and might be attended with embarrassment at the final hearing.

I am of opinion the bill must remain in its present form; for I can perceive no good purpose to be answered by allowing the proposed alterations to take place.<sup>(a)</sup>

Motion denied, with costs to be taxed.

(a) This decision was affirmed by the Chancellor on appeal.

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TOWNSEND  
v.  
LOW.

TOWNSEND v. Low, et. al.

The court can settle a decree without the necessity of a notice of settlement or on short notice.

It is not regular for a master to sign his report without first issuing a warrant to settle. But, where a copy of report and order of confirmation has been served and decree enrolled, the neglect to serve the warrant to settle will not, alone, be sufficient to open the proceedings.

Where a decree fixes the *data* for computation, the master should not depart from it. Still, where a master did so and it was beneficial to the defendant, the latter could not take advantage of the irregularity. But where it was done and the execution on it was, in amount, (wrongly) against the defendant, the court put it to the complainant to relinquish the improper excess, or to consent to waive the decree.

Where a defendant, in a bill for an account, has put in his answer without oath and does not show facts which he wishes to give in evidence or what witnesses, in particular, it will be important for him to examine, a decree, taken by default, will not be opened to give him the privilege of going back to proofs.

THE bill was filed by the complainant, William B. Townsend, calling the defendant, Daniel Low, to account in relation to joint operations in real estate; and claiming sole right to a mortgage covering a part of it. And the former had obtained a decree, before the Assistant Vice-Chancellor of the First Circuit, by default. On the day the decree was obtained, namely, on the tenth day of March, one thousand eight hundred and forty-three, the solicitor for the complainant prepared a draft of a decree; and attended the Assistant Vice-Chancellor that same day to procure his allowance, but his honor directed him to give notice of settlement for the following morning at ten o'clock. The solicitor served notice and copy in the afternoon. At the time of the proposed settlement, the complainant's solicitor attended before the Assistant Vice-Chancellor; and the same was allowed by his honor; and the decree was thereupon filed. A summons to compute was then issued by the master to whom the decree was referred and served on the defendant's solicitor. As it turned out that the defendant Low was entitled to a deduction (on account of a judgment) which was not embraced by the *data* in the decree, the same was allowed

May 24,  
1843.

Practice.  
Master's  
office.  
Report.  
Decree.  
Default.

1843.

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v.  
LOW.

before the master and taken into account in his report ; and, on the said reference before the master, a witness, who had before testified in the examiner's office, was again examined to prove the dates of payments made to the complainant, (and which, by a stipulation between the parties, were to have been allowed) and stated that, having made a more minute and accurate examination of the accounts, he found that the sums actually paid to the complainant was less, by the sum of two hundred and twenty dollars, than the sum which he had given on his examination in the cause. The master, therefore, made a special report as to it. No warrant was issued to settle the master's report ; it was filed and an order entered for confirmation ; and a copy of the report and order was served. The decree became enrolled and was docketed. Afterwards, the solicitor for the complainant discovered the existence of a clerical error in that part of the order of confirmation which recited the finding of the master's report—the order stating the sum at eight thousand and forty-eight dollars and six cents, while the finding was for eight thousand four hundred and eighty-four dollars and six cents. The error was a clerical one—and the docket of the decree coincided with the amount stated in the report. An execution had been issued for the latter sum (not, therefore, noticing or deducting the two hundred and twenty dollars.)

The defendant, Daniel Low, now presented a petition, praying for a further reference or that the decree might be modified.

The above particulars, when coupled with the opinion of the court, will be found sufficient for an understanding of the points.

Mr. *F. B. Cutting*, for the petitioner, referred to *Tyler v. Simmons*, 6 Paige's C. R. 129 ; Laws of 1840, in regard to executions, § 23, 24, 25, 27, 39 ; 2 Revised Statutes, 178, § 71 ; Ib. 183, § 104 ; *Millsbaugh v. McBride*, 7 Paige's C. R. 509 ; *Tripp v. Vincent*, 8 Ib. 176.

Mr. *William S. Johnson*, contra.

June 13. THE VICE-CHANCELLOR :—There was no irregularity in

the proceedings down to the hearing and the entry of the decree on the eleventh of March, one thousand eight hundred and forty-three. It was competent for the Assistant Vice-Chancellor to settle and allow the decree upon short notice or even without any notice of the settlement to the defendant.

Then, as respects subsequent proceedings under it. On receiving a copy of the decree, the master on the same day issued a summons, underwritten: "To compute the amount due to the complainant under the final decree in this cause" returnable on the fourteenth of March; and the defendant or his solicitor not appearing, the master proceeded and made his report on the fifteenth of March, without any warrant to settle. As the defendant did not appear on the return of the summons the master was at liberty to proceed *ex parte*: (Rule 104.) But, he was not strictly regular in thus settling and signing his report without first sending a warrant to the defendant's solicitor to attend. The 109th rule seems to require, in all cases where the defendant is in court by a solicitor, that he should have notice to attend the settlement of the draft report, and that too whether he has appeared on the reference or not; and I nowhere find in the books of practice that a warrant to settle can, in such cases, be dispensed with. Still, after being served with a copy of the report and a copy of the order of confirmation, as the defendant's solicitor was on the seventeenth or eighteenth of March, and taking no immediate steps to set aside the report for irregularity or to be let in to except to it, but quietly resting upon it until after the decree had become enrolled and a *fi. fa.* issued, I should hardly feel myself called upon, for the sake of enforcing mere regularity of practice, to set the report aside. Something more should be shown, going to the merits—such as, a miscalculation or error in the computation or departure from the order of reference to induce the court, under such circumstances, to disturb the report. Has anything to that effect occurred in this instance? The decretal order gave the *data* for the computation of interest and for ascertaining the balance which the defendant was to pay. The master departed from this when he received the admission of the complainant that the amount due from him

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on the judgment was to be set off and credited to the defendant ; but, as this had been the subject of an express stipulation between them and was inadvertently omitted to be mentioned in the decree and as the allowance of it was to benefit the defendant, he has no right to complain of the master in that respect. The master also departed from the order, when he permitted a witness to correct the mistake in his former testimony as to the amount of the payments by showing they were two hundred and twenty dollars less than the amount admitted by and inserted in the decree. But, as the master made distinct calculations on both amounts, showing the result of each, so that the court might restrict the recovery to that which comported best with the decretal order he had taken, I do not perceive the necessity of setting aside the report entirely for that cause. So, with regard to the other amounts or results reported by the master on the different hypotheses assumed. Though not called for by the decretal order of reference, they can do no harm to the defendant so as, necessarily, to require the report to be set aside : since the court can take care that the complainant shall receive only the amount to which he is properly entitled. That amount, upon the basis of the decree as it stands, is the sum of eight thousand two hundred and forty two dollars and eighty-nine cents, being one of the sums reported by the master and which corresponds with the decree. For this sum the report should have been confirmed, unless the complainants had first applied to correct the decree on the witness's latter testimony. There is an error in the confirmatory order of the seventeenth of March as to the amount intended—instead of eight thousand and forty-eight dollars and six cents, the solicitor evidently intended to have the report stand confirmed for eight thousand four hundred and eighty-four dollars and six cents (the amount for which he afterwards issued the execution) and which is the true amount after correcting the mistake ; but which can not be done under the present decree. If the complainant is willing to relinquish the difference, an order can now be made, vacating the order of the seventeenth of March as erroneous and confirming the report *nunc pro tunc* as of that day for the sum of eight thousand two hundred and forty-two dol-

lars and eighty-nine cents and reducing the amount to be made on the execution accordingly. But, if the complainant would claim more and insist upon having the mistake of two hundred and twenty dollars corrected, he must consent to waive the present decree and to go back to the taking of testimony and to a rehearing of the cause, letting the defendant in to take proofs also and to defend.

The next question is, whether the defendant has shown enough of merits and by way of excusing his defaults to entitle him to be let in to a defence generally by opening the proofs and going to another hearing? I cannot perceive that he has. In the first place, his answer was put in without oath and he does not now show any particular facts he wishes to give in evidence or what witnesses, in particular, it will be important for him to examine. After what has taken place, he is bound to show some particulars of this sort in order to have the privilege of going back to proofs. Besides, the excuse put forward for not attending the examination of witnesses at the time can hardly avail. His solicitor's neglect was his own, especially after notice to him personally of the complainant's proceedings. Though absent at Washington, he could have given directions and procured counsel to attend and cross-examine the witnesses. I see no propriety in opening the proofs. Then, upon the evidence as it stands, has the complainant obtained a decree which he is not entitled to? I think not. It seems to me that the testimony warrants the court in assuming, as it did, that the balance of the account annexed to the bill was the true sum due; and that the court might well decree the payment of that sum, with interest. Nor do I see any thing wrong in charging the defendant with the whole amount of the mortgage-debt as between him and the complainant. He does not show that he has not realized it—and the testimony goes far to show that he has, when his dealings in shares of the Staten Island Association are taken into the account.

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LOW.



1843.

CROSBY  
v.  
BERGER.

CROSBY, administrator, &c. v. BERGER, LOCKWOOD and another, executors of Duvet, deceased.

A solicitor who is made a defendant and who desires to protect himself from answering on the ground of confidential communication, must distinctly show that his knowledge and information came solely from his client. He is not exempt, merely because he obtained it while engaged in business for his client. And should he afterwards become the executor of his client and he is made a defendant to reach the property which had been held by such client, the privilege would cease and he must answer in connection with it.

June 15th,  
1843.

*Pleading.  
Exception.  
Answer.  
Solicitor  
and client.  
Confiden-  
tial com-  
munica-  
tion.*

THE bill was filed against the defendant Mr. Ralph Lockwood and others, executors of Divine Duvet, in order to reach the property in the hands of himself and his co-executors, which was alleged to have come to the hands of the testatrix as executrix of John Balbi. The bill called for an account of such property. To this part of the bill the defendant Ralph Lockwood declined to answer; and as an excuse for so doing he stated in his answer that Duvet never filed any inventory and that he acted as her attorney, solicitor and counsel and, as such, derived all his knowledge and information of the account and value and species of property left to her by Balbi; and, as such confidential attorney, solicitor and counsel, he submitted to the court that he could not, without a violation of such professional confidence, discover the same or make answer to that part of the discovery prayed for by the complainant.

Exceptions were taken to the answer. The fourth exception was taken on a ground of neglect to answer such parts of the bill as the said defendant, Ralph Lockwood, had attempted to cover by his professional character; while a fifth exception was taken, because, while he had answered as to certain matter, yet he had not answered fully. The master had allowed the exceptions; and the defendant had excepted to his report.

Mr. *J. L. Mason* and Mr. *B. F. Butler*, in support of the exceptions.

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CROSBY  
v.  
BERGER.

Mr. *Lockwood* in *pro. per.*

Oct. 16,

THE VICE-CHANCELLOR:—The defendant claims exemption from the necessity of answering as to the matter of the fourth exception, by stating in his answer that he acted as attorney, solicitor and counsel of Duvet in proving the will of Balbi and procuring letters testamentary to her and in her not filing any inventory, “and as such attorney, solicitor and counsel derived all his knowledge and information of the amount and value and species of property left by Balbi to her.” He does not say that he derived his knowledge and information by means of communications made by Duvet to him; and in this particular I think the answer falls short of the point. It is communications from the client to the attorney or solicitor that are deemed confidential and privileged and not knowledge or information which the attorney or solicitor may have acquired from other sources. I understand that to be the rule: *Sawyer v. Birchmore*, 3 Mylne & K. 572; *Desborough v. Rawlins*, 3 Mylne & Cr. 515. The latter case appears to me to be strongly in point; and it shows, moreover, that a party claiming to be exempt from making a discovery must bring himself clearly and distinctly within the privilege. Mr. Lockwood may have obtained all his knowledge of the matters inquired about while acting as the legal adviser of Duvet, but all the cases show that this is not enough. He should go further and say, distinctly, that the knowledge was communicated to him by his client either orally or by means of her papers and documents put into his hands in the capacity of her legal adviser. This, he does not show to have been the fact. He must, therefore, make the disclosure required of him by the fourth exception. But, if the case was within that of privileged communications originally, I am of opinion that the privilege ceased when Mr. Lockwood became an executor and residuary devisee, and, in that capacity, is called on to account and surrender the property. With respect to the fifth exception, the rule settled

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v.  
BERGER.

by the chancellor in the *Bank of Utica v. Messereau*, 7 Paige's C. R. 517, seems decisive of it. Indeed, it was pretty much admitted on the argument that, after that decision, the defendant could not avoid putting in a further answer, upon this exception.

Order that the exceptions to the master's report be overruled, with costs.(a)

(a) This decision was affirmed on appeal, the Chancellor (Walworth) giving the following opinion:

*The Chancellor*:—"It is not necessary to examine the question as to the fifth exception, as that question was decided adversely to the appellant in the case of *The Bank of Utica v. Messereau*, 7 Paige's Rep. 517.

"The appellant is under a mistake in supposing that an attorney or counsellor is privileged from answering as to every thing which comes to his knowledge while he is acting as attorney or counsel. The privilege only extends to information derived from his client as such either by oral communications or from books or papers shown to him by his client, or placed in his hands in his character of attorney or counsel. Information derived from other persons or other sources, although such information is derived or obtained while acting as attorney or counsel, is not privileged: *Spenceley v. Schulenburg*, 7 East's Rep. 357. The object of the rule protecting privileged communications from being disclosed by the attorney or counsel is to secure to parties, who have confided the facts of their case to their professional advisers as such, the benefit of secrecy in relation to such communications, so that the client may disclose the whole of his case to his professional adviser without any danger that the facts thus communicated to his attorney or counsel will be used in evidence against him without his own consent. But the principle of the rule does not apply to the discovery of facts within the knowledge of the attorney or counsel which were not communicated or confided to him by his client, although he became acquainted with such facts while engaged in his professional duty as the attorney or counsel of his client. See *Coveney v. Tannahill*, 1 Hill's Rep. 33, and cases there cited. Thus in the case of *Sawyer v. Birchmore*, 3 Myl. & Keene, 572, Lord Cottenham, while master of the rolls, decided that an attorney was bound to produce letters communicated to him from collateral quarters and to answer as to matters of fact as distinguished from matters communicated to him by his client in professional confidence.

"And the same principle was afterwards confirmed by him, as Lord Chancellor in the more recent case of *Desborough v. Rawlins*, 3 Myl. & Craig, 515. The decision of Lord Brougham in the case of *Greenough v. Gaskell*, 1 Myl. & Keene 98, does indeed appear to extend the privilege further than the previous cases would warrant and beyond the principle upon which the privilege is founded. But I think the true rule on the subject is to be found in the decisions of Lord Cottenham before referred to; in the able opinion of Mr. Justice Bronson in the case of *Coveney v. Tannahill*, in our own supreme court; and in the recent opinion of Lord Langdale in *Robinson v. Flight*, in July last, (8 London Jurist Rep. 888.)

"In the present case, it may be true, as stated in the answer of Lockwood, that he derived all of his knowledge and information of the amount and value and species of property left to Duvet by the will of Balbi as her confidential attorney, solicitor and counsel and yet he may not have obtained any part of that knowledge or information from her either directly or indirectly.

"In the course of his professional duty, he may have examined the public records and found deeds there conveying real estate to Balbi; and may have examined and ascertained, either by his own view or from the information of others, the situation and value of such real property. In the same way he may have ascertained that large amounts of stock were standing in the name of Balbi at the time of his death upon the books of various corporations and the value of such stocks. And it is wholly improbable that the defendant, who admits he was the general attorney and solicitor of Duvet, has no knowledge or information as to the property of Balbi except such as she has obtained from Duvet herself in his character as attorney and counsel. The fourth exception to the answer was, therefore, well taken; and it is not necessary to inquire whether Duvet's privilege was not at an end when Lockwood became her executor and legatee by her own appointment.

"The order appealed from must be affirmed, with costs; and the proceedings are remitted to the Vice-Chancellor of the first circuit."

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CROSBY  
v.  
BERGER.

1843.

TYACK  
v.  
BROMLEY.

TYACK and othes v. BROMLEY *et al.*

The act of the legislature of the 19th February, 1819, authorized a board of port wardens, under the style of the master and wardens of the port of New York, with a common seal and who should have an office and clerk and power to survey vessels deemed unfit for sea and to judge of their necessary repairs to perform the voyage and to inspect sales of vessels and goods arriving damaged and required to be sold for the benefit of underwriters out of the city of New York and to grant certificates and receive fees and their appointment making them public officers: *Held*, that they had exclusive right to perform the duties specified by the act. And, that an association of persons advertising to survey ships and merchandize, setting up an office close by that of the port wardens and calling themselves "Marine surveyors for the port of New York, appointed by the chamber of commerce and board of underwriters," and giving out that they performed the same duties as the port wardens and that their acts would be more authentic than those of the port wardens, had no right to execute any of the statutory duties appertaining to the office of the latter. And, *it seems*, they had brought themselves within the principle of the cases connected with simulated devices and deceits.

The legislature, making a grant to some, may afterwards make a similar grant to others; but, without such latter grant, the former have exclusive right and no express prohibition or restraining law is necessary to prevent rivalry. The grant implies a prohibition.

*It would seem* that a statutory grant of fees or perquisites carries with it an exclusive right to perform the services that earn them.

Chancery can act, although there may be a remedy at law: as, where repeated actions might have to be had or remedies at law are not full or adequate.

Although it is not proper for equity to restrain, in the first instance, where there is doubt or difficulty on the law or the facts, yet, it will restrain by injunction, without first requiring the establishment of right at law where a clear case of statutory or common law right is presented and the party is in the possession and enjoyment of a right which is daily or continually violated or threatened to be destroyed or rendered valueless.

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*Simulated devices and trade marks.*  
*Statute.*  
*Legislative grant.*  
*Jurisdiction.*  
*Injunction.*

BILL by William Tyack, Harry Parsons, Anthony Moffat, Richard H. Tittle, William C. Neilson and William Newcomb, describing themselves as the master and wardens of the port of New York and William Hall their clerk. It set forth that the office of wardens of the port of New York was of long standing; and their duties were beneficial to the community and to commerce and the com-

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mercial marine of the port. That before and since the formation of the government of the United States and of the State of New York, acts of the legislature as well colonial as of state authority had been passed, from time to time, establishing, confirming and recognizing the office and regulating the discharge of its duties. That the statute law of the state of New York, under which the office at present existed and through which the complainants derived their right was the act, entitled, "An act to reduce several laws relating particularly to the city of New York into one act, so far as the same relates to the master and wardens, harbour masters and pilots of New York and their duties and for other purposes," passed February 19th, 1819, by which, *inter alia*, a board of wardens for the port of New York was established, to consist of a master and five wardens, to be known by the name of "the master and wardens of the port of New York," who were to have and use a common seal; administer oaths touching the business of the board and sue for fines and penalties; while the officers were to take oath faithfully to perform their office; and were authorized to appoint a clerk. They were directed (in such act) to keep an office in the city of New York, have books of minutes, &c. Also, by such act, it was declared that every vessel arriving in the port of New York (except vessels belonging to a citizen and such as were permitted by law to enter on the same terms) were to be reported at the office of the said board of wardens under the penalty of fifty dollars for each neglect;—the owners of which were to pay for each vessel certain fees therein specified to be sued for and recovered in the said name of the master and wardens of the port of New York. Also, (by the said act,) that the said master and wardens or any two of them, with the assistance of one or more skilful carpenters, were to be surveyors of any vessel deemed unfit to proceed to sea and such wardens were to be judges of the repairs which might be necessary for such vessel on her voyage; and in all cases of vessels and goods arriving damaged and required to be sold at auction for the benefit of underwriters out of the city of New York such sale was to be made under the inspection of the said master and wardens, who

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were to certify the cause of such damage, the amount of sales and charges of sale and were to be allowed for their services and for every survey on board, &c. &c. Certain fees and emoluments were prescribed; and such fees, &c. were to be equally divided between the said master and wardens and their clerk.

Also, the bill alleged that the said office of wardens of the port of New York was classed and named among other offices of the state of New York by the statute contained in the revised laws providing for the number, location and classification of public officers of the state and their mode of appointment. That the complainants had been regularly appointed, whereby they became entitled to the fees and emoluments of the office; and they well hoped that they might have enjoyed the same, but that the defendants Reuben Bromley, Thomas H. Merry, Russell Sturges, Alexander J. Cartwright, Joseph Tinkham, Samuel Candler and Robert T. Norris, had openly alleged that the office was a monopoly and that they had a right to execute similar duties and pretended and gave out that it was necessary; that what was usually called "Lloyd's" or "Lloyd's Coffee House," at London, in England, was an association that controlled insurance and premiums on marine risks and should be represented in the board of wardens and that one of the persons performing the duties of the complainants should represent the interest so called Lloyd's and that these complainants had not discharged their duties in a proper manner; and that the defendants had opened an office in the said city of New York for the performance of duties which would otherwise devolve upon the complainants by virtue of their office of port wardens and had hired rooms adapted to such purpose at No. 67 Wall street, New York, which was near to the office of the complainants and had issued circulars giving themselves out to the public as a board of persons authorized and competent to perform marine services and the duties of port wardens; and that they openly declared their design was to put down the office of the complainants and to deprive the latter of the business and emoluments of the same. The bill charged an attempt at usurpation of office. Also showed that the defendants, in

furtherance of their plan, had made and executed surveys of damaged goods and merchandize and made and granted certificates in, apparently, official form similar to certificates granted by the complainants; that this was done on board the ship Garrick, the ship Yazoo, the brig Ponce, the ships Orleans, St. Mary and Levant and of other goods and merchandize on board of other vessels in the port of New York; and all of which were cases contemplated by the said act of the legislature imposing duties which belonged to and devolved upon the complainants by virtue of their said office. Also, that it happened that the ship Florida, lying in the port of New York, after having taken in a cargo and finished lading, sprung a-leak, on which it was necessary to decide whether the said vessel should be discharged of her cargo or proceed to sea, whereupon the said defendants busied themselves and, assuming the functions of the office duties of the complainants, pretended to make the necessary survey for repairs and made a survey in the premises.

*Prayer:* That the exclusive rights of the said complainants to the said office might be decreed; and that the defendants might be perpetually enjoined from molesting, interfering with or disturbing the complainants or any of them in the use, enjoyment or exercise of the said duties respectively appertaining to the complainants as the master and wardens of the port of New York and their clerk and from taking the fees thereof and from demanding or receiving fees or emoluments from any person or persons for any such services; and from acting as surveyors of any vessel deemed unfit to proceed to sea and from judging or acting as judges of the repairs which might be necessary for the safety of such vessel on the intended voyage and from selling, under their inspection, vessels or goods arriving at the port of New York damaged and for the benefit of underwriters out of the city of New York and from certifying the cause of such damage, the amount of sale of such vessel or goods and the charges attending the sale and from taking or making any survey on board of any ship or vessel or at any store in the city of New York or along the docks or wharves thereof or damaged goods and from giving or granting any certificate in consequence of damaged goods

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and from taking or making any survey on board of or relating to any ship or vessel put into the port of New York in distress, to ascertain the damage sustained thereby and whether any such ships or vessel shall pay or be liable for foreign duties and tonnage or otherwise.

An order had been granted for the defendants to show cause why an injunction should not issue.

Mr. *Benjamin F. Butler* and Mr. *H. S. Mackay*, for the complainants, referred to 1 Greenleaf's Stat. 78, 83, 86; 5 Laws of New York, 11; 4 J. C. R. 48, 160; 5 Ib. 100, 300; 1 Ib. 611, 615; 9 Wheaton, 209, 749, 841; 8 Paige's C. R. 74; 9 Ib. 507; 1 Smith & Liv. 169; Drury on Injunctions, chap. 4, p. 230; 2 Keen, 213; *Foster's Case*, 11 Coke, 59, 64; 2 J. C. R. 164; Hopkins C. R. 416; 1 Paige's C. R. 447; 2 Atk. 392; 1 R. S. 530, § 9.

Mr. *F. B. Cutting*, contra, read affidavits which are referred to by the court and, also, quoted from 2 R. S. 697; 5 Bac. Abr. 199; 2 R. S. 581, § 28, 30, 32, 34; 2 Atk. 483; Ib. 391; 6 Bro. P. C. 575; 1 Bro. C. C. 40; Ib. 572; 7 J. C. R. 336; 2 Ib. 261; Jeremy's Eq. Jur. 344; 4 Bingham, 183; Dwarris, 749; 1 Story's Laws of U. S. 625, § 60; 1 R. S. 508, § 177, 181; Ib. 535; Laws of 1835, p. 203; 1 R. S. 405, 454; 11 Peters, 420.

Aug. 8.

THE VICE-CHANCELLOR :—The complainants compose the board of port wardens of the port of New York and to which office they were appointed by the governor and senate of the state; and the defendants are an equal number of persons who have assumed the name of "Marine surveyors for the port of New York," and have undertaken to perform many of the duties which the complainants claim to belong exclusively to them by virtue of their office. It is the principal object of the bill to restrain the latter from such interference.

The bill, in the first place, refers to the laws of the state creating the office of master and wardens of the port; and it, then, shows that the complainants have been only appointed and taken the oath of office and are in discharge of

the duties thereof and, as such incumbents, they insist that they are entitled to perform all the duties and transact all the business appertaining to the office and to receive all the fees and emoluments thereof, but that the defendants fraudulently intending to injure the complainants in the enjoyment of their office and to interrupt and disturb them therein, have, under various unfounded pretences, set about depriving them of their business and have opened an office contiguous and nearly opposite to the location or office of the complainants in the same street from which the defendants have issued a circular and cards of business, holding themselves out to the public as a board authorized and competent to perform the duties of the complainants in relation to marine surveys.

The defendants show, by their affidavits—not having as yet answered the bill—that having been appointed by the Chamber of Commerce and Board of Underwriters of the city of New York “to survey ships and merchandize,” they issued a circular headed “Marine Surveyor’s Office,” and dated May 25th, 1843, announcing the fact of such appointment, and that they had taken an office, No. 67 Wall street, for the accommodation of merchants and masters of vessels to be kept open daily throughout the year, and that their charges for services would be as follows: For every survey on board vessels and on merchandize, \$2; for every certificate of the same, \$1; for every survey on vessels put into this port in distress or needing repairs, \$2 50; for every certificate of the same, \$2 50. They also issued a card in these words: “Marine Surveyors, Port of New York, appointed by the Chamber of Commerce and Board of Underwriters, office 67 Wall street”—with their names. The defendants also exhibit a certificate, dated June 9, 1843, from the Chamber of Commerce and the Board of Underwriters, stating that the defendants were appointed by their respective boards as suitable persons to act as Marine Surveyors for the port of New York and recommending them accordingly in all cases where their services might be required. Still, in their affidavits, they disclaim all interference with vessels or goods arriving at the port of New York in a damaged state which may be required to be sold at auction for the benefit of un-

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derwriters out of the city of New York. They do not, however, deny what is very strongly imputed to them in the charging part of the bill, namely, that they have fraudulently combined to injure the complainants; to interrupt them in the enjoyment of their office; and to deprive them of the business and emoluments belonging to it. Nor do they deny that they have set on foot the plan of opening and keeping an office for that purpose, and that they do openly and publicly declare that their design is to put down the office of the complainants by discharging the duties thereof themselves, and that they have assimilated their association and their mode and manner of doing business as near as may be to the organization and arrangement of the complainants, giving out that they perform the same duties and may be relied on as being more competent and that their acts will be more authentic. Nor do they deny that they have held surveys of damaged goods on board of a number of vessels or granted certificates in apparently official form, similar to certificates granted by the complainants in like cases and in one instance, (the case of the ship Florida, which had finished taking in her cargo and, while in port, had sprung a leak,) put themselves forward to make the necessary survey for repairs and had either made such survey or were then engaged in making it, in defiance of the complainants. Neither do they deny that the complainants have remonstrated with them and requested them to desist and that they refused and still give out that it is their deliberate intention to continue their opposition and to use all their influence entirely to supplant them in their official business. These and other charges in the bill not being denied, must, for the purposes of the present application, be taken as true. Whether the motives with which this opposition has been got up and is persevered in, as charged, can have any influence upon the question of this court's jurisdiction, it may become necessary to inquire. But the first question to be considered is: what are the complainants entitled to, *virtute officii*? Is it, to the sole and exclusive enjoyment of the business belonging to the office of port wardens as established by law or is it a business in which they may only be allowed to par-

ticipate in common with others who may assume to perform the same or similar functions?

The office of port wardens is one of considerable antiquity even here. It was established by law during the existence of the Colonial Government (1 Smith & Liv. 160); and it has been continued by repeated acts of legislation down to the present time, with but slight alterations. The last act and the one now in force, so far as regards the powers and duties of port wardens, in respect to the present question, was passed February 19, 1819: (Laws of 1842, Sess. ch. 18.) By this law they are made public officers. They are appointed as such by the Governor and Senate—are organized as a board or body politic under the name of the master and wardens of the port of New York, with power, in that name as a corporation, to sue for all fines, penalties and forfeitures arising under the act and to use a common seal. They take an oath of office, are required to have a clerk, and keep an office open where they are to give daily attendance and where their clerk is to keep a record or book of entries of all their proceedings, which is to be open to the inspection of all persons desiring it. The arrival of all foreign vessels is to be reported at their office under a penalty of fifty dollars for each vessel and certain fees are payable to them with the report of every such vessel. By the § 5 of the act their powers and duties, with respect to the survey of vessels and damaged goods are declared. They or any two of them, with the assistance of one or more skilful carpenters shall be surveyors of any vessel deemed unfit to proceed to sea. They or any two of them shall be judges of the repairs which may be necessary for the safety of such vessel on the intended voyage. And in all cases of vessels and goods arriving damaged and by the owner or consignee required to be sold at public auction on account of such damage and for the benefit of underwriters out of the city of New York, such sale shall be under their inspection; and when required by the owner or consignee, they shall certify the cause of the damage, the amount of sale of the vessel or goods and the charges attending the sale. For these and all other services their compensation is fixed in the shape of commissions and fees.

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From this brief analysis of the statute and of the powers it has conferred and from the fact that a public office is created and that the persons appointed to fill it are, from the moment they enter upon their duties, public officers, I consider it follows that their powers are and necessarily must be deemed exclusive—such as no other persons, without a similar authority of law, are at liberty to perform. The statute is, of itself, a grant of powers to be exercised in the cases specified and in the manner pointed out for the purpose of subserving the great interests of navigation and commerce in the port of New York. It is, in fact, the grant of an office in the nature of a franchise like the grant of a ferry or a toll bridge or of the right to hold a public fair or market and a similar grant for like purposes may, at any time afterwards, be made to others: See the great case of the rival bridges, 11 Peters' R. 420, for the principle. But, without the grant of a rival power from the same authority, individuals have no right to set up a rival office or business and assume to themselves the performance of the same public duties for the like emoluments. It matters not, in my judgment, whether there be any express prohibition or restraining law to prevent such rivalry or not. The grant itself in the case of an office of this sort implies a prohibition against its exercise by others, unless they can show an equal authority.

The language of the § 5 is imperative and, at the same time, explicit. The persons holding the office shall be surveyors; they shall be judges of repairs; sales shall be under their inspection; and they shall certify the cause of damage, the amount and the charge attending the sale. This is tantamount to saying, they shall be the surveyors and the judges and the persons to perform the other prescribed duties and no other persons shall possess the same or similar powers. Then, to what does this exclusive power particularly relate and where is its limit? It relates to a survey of vessels to ascertain their seaworthiness and the necessity and extent of repairs to enable them to prosecute the voyage in which they are engaged. It does not, of course, apply to or include vessels lying in port and requiring ordinary repairs or overhauling previous to taking on board a cargo: for, in all such cases, the master and owners being alone interested, must

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be left to determine for themselves the repairs and outfits; and they may or may not, as they shall think proper, call to their assistance third persons to determine for them. But this provision of the law does apply to every vessel actually engaged in the prosecution of a voyage and putting into port owing to some disaster or injury sustained which has interrupted its prosecution and also to vessels in port which, having taken cargo on board and being about to commence a voyage, have sprung aleak or met with some accident to affect their safety in the intended voyage. These are cases in which the regularly appointed master and wardens of the port have the exclusive right to hold surveys and to judge of the necessity and extent of repairs and to give the proper direction therefor. The reasons for vesting this power in persons selected for their skill and clothed with public authority is obvious enough: there may be others interested in the safety of the vessel besides the master and owners, as shippers of cargo, passengers embarking or placing property on board, mariners hired to go the voyage—all have a right to the judgment of impartial and disinterested men as to the safety and ability of a vessel to proceed to a successful termination of the voyage, after any disaster has occurred to her calculated to increase the hazard or to place property and lives in greater jeopardy. So, with respect to vessels and goods arriving in a damaged state and which, in consequence thereof, are required to be sold for the benefit of underwriters out of the city of New York—it is conceded by the defendants that the power belongs entirely and exclusively to the legally constituted master and wardens of the port to hold a survey and attend the sales and give the necessary certificates of the result.

But it is said, they can have no such exclusive and compulsory right where a vessel or goods have arrived in a damaged state and the same are insured by resident underwriters who are present to look after their own interest in the property. I agree to this proposition. It must be so. The law appears not to embrace the case in terms and there is no reason why it should. The owner or consignee and the underwriter being on the spot and seeing the damage, may agree upon the amount to be paid for loss without a previ-

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ous survey or they may select any person to appraise the damage and agree to be bound by his report and award or, if they should deem a sale of the damaged property advisable, they may agree upon an auctioneer and the time and place of sale and may attend to see that the sale is fairly conducted; and having the result before them, they can then adjust and settle the amount of loss. And so, likewise, if the property should be abandoned to the underwriter, he, being present, may, at once, agree to accept it and pay for a total loss and immediately take possession and dispose of the property in his own way; for, in all such cases, there is no necessity for the intervention of the law through the medium of public officers. But, if a regular and formal survey should be deemed advisable or expedient for any purpose "on board of any ship or vessel or at any store in the city of New York or along the docks or wharves thereof on damaged goods," or "on board of any ship or vessel put into the port in distress to ascertain the damages sustained," whether with a view to a sale at auction or not, then it appears to me the port wardens are the only persons who can properly and legitimately make the surveys, because the law has prescribed certain fees which they shall be allowed to take for every such survey and for every certificate given in consequence of finding damaged goods and for every certificate of damages sustained by every ship or vessel which has put into the port in distress. A grant of fees or perquisites seems to me necessarily to include within it a grant of the power or authority to perform the service for which the fees are given; and it follows, also, that the grant is and must be of an exclusive character. The words quoted from the latter part of the § 5 are to this effect and this construction does not conflict with the liberty which the parties in interest have to dispense with surveys altogether by their mutual agreement in the cases which I have supposed or to call in third persons of their own choosing to perform a mere friendly unofficial act between them. But such persons cannot be employed as legally constituted surveyors of the port nor as surveyors to make and certify surveys in the manner and similitude of port wardens-surveys, nor with an intention that they shall have the same force and effect or any

other effect than belongs to the acts of mere individuals in a matter of private business.

There is a class of cases which clearly belong to the supervision of the port wardens and in which their services cannot be dispensed with, although there may be no necessity for effecting a sale either of the vessel or goods arriving in a damaged state within the letter of the statute. These are cases in which the government is concerned in respect to duties. The act of Congress (1 Story's Laws of the U. S. 625, § 60,) provides for the unloading of vessels free from duty which arrive in distress at ports to which they are not bound, upon the production to the collector, among other things, of the certificate of the wardens of the port showing the necessity for unloading the vessel. If there are such officers as port wardens at the place of arrival, they are the persons primarily and exclusively entitled to hold the surveys and to grant the certificates and the collector is not authorized to receive the certificates of any other persons; but if there be no such officers at the place, then the certificate of other persons may be received.

If there are any other provisions in the revenue or navigation laws of the country having reference to official acts of port wardens as evidence for any purpose, then it is also clear that, in all those cases, they have a right to perform the service exclusively of all other persons, unless the law admits of a concurrent authority and right in others to do the same thing.

Having thus shown what appears to be the just conclusion in regard to the law conferring powers upon the port wardens and having pointed out in what particulars it is a grant of exclusive powers in virtue of their office and in what cases their services may be dispensed with, I would now observe that the appointment which the defendants have so publicly exhibited from the Chamber of Commerce and the Board of Underwriters can be of no avail to them against the legal rights of the complainants. If by that appointment it was intended, as it purports on its face, to clothe the defendants with authority as "marine surveyors for the port of New York" to act in all cases where surveys might be required of vessels and merchandize and to perform the same

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duties in all respects as port wardens, then they have greatly mistaken the law and the powers which these mercantile institutions possess, however venerable the one and highly respectable both may be. They have no authority to make such an appointment or to sanction the establishment of a self-constituted and organized body of persons for the purpose of supplanting the lawfully constituted board of port wardens. Such an attempt would be an act of insubordination to the laws of the state, if not a downright usurpation of the powers of government, which it is hardly to be supposed could have been intended or contemplated. It is much easier to believe that what is made to assume the appearance of an appointment of public officers and the establishment of a rival office of marine surveyors was designed merely to recommend the individuals named as suitable persons to be employed in making surveys of sea damage wherever they can be thus employed without encroaching upon the rights of the complainants; and it is to be regretted that, in granting that favor, they had not used words in that limited sense, instead of recommending them as marine surveyors for the port in all cases and without any discrimination.

It may be further observed, that if the office of port wardens as established by law is a monopoly and, for that or for any other reason of state policy or expediency at this day, ought to be suppressed and the business thereof thrown open to free competition or if the incumbents for the time being are not so competent or well skilled as others may think themselves to be or be thought by others to be to discharge its duties, it is not for individuals or mercantile associations or combinations of any sort to take the law into their own hands and treat it as a dead letter. So long as a statute remains unrepealed, it must be respected and obeyed, although it may seem to operate harshly by conferring exclusive rights and privileges on a few at the expense of the many. Courts of justice are bound to aid a party in possession of rights whether they be natural or artificial or such as are the mere creations of law, whenever those rights have been infringed or their destruction may be threatened. In the one case the grievance is redressed by the award of damages and, in

the other, a preventive remedy may be sought for in the extraordinary powers of a court of equity.

Then, is the present case one which calls for the latter remedy and is it within the well established bounds of this court's jurisdiction to grant it? It is objected, that there is a remedy at law. This may be very true; but, still, it does not follow that chancery may not interfere. An action on the case every time the complainants' rights are invaded would be extremely troublesome. It might keep the complainants constantly on the alert to find out when they were injured and where to procure the necessary witnesses to prove it and from the frequency of the acts many of their rights could escape detection. The remedy by information in the nature of a *quo warranto* or by indictment as for a misdemeanor, which were suggested in argument, even if the case is within the provisions of the statute on either of those subjects which is, at least, doubtful, (2 R. 581, § 28; Ib. 696, § 39) might not afford that full and adequate relief to which the complainants are entitled. It is an old saying that prevention is better than cure; and it holds good in cases of this sort.

Again—it is contended that the complainants should establish their right by a judgment at law before coming into a court of chancery. This, the court will sometimes require. In cases of doubt or difficulty on the law or the facts, it is discreet to await the decision of a court of law upon the legal right set up. But where a clear case of statutory or common law right is presented and the party is in the possession and enjoyment of the right which is being daily and continually violated, this court may and often does interfere without waiting the previous action of another court: *Livingston v. Van Ingen*, 9 John's R. 569, 570 and 585-587. With regard to the jurisdiction of the court of chancery in cases of this sort, I think it is abundantly established. Cases have occurred perfectly analogous in principle in which the power of this court by injunction has been exercised without hesitation and such cases are high authority as precedents. Indeed, it has become a familiar principle of equity jurisdiction to protect by injunction statutory rights and privileges which are threatened to be destroyed or rendered value-

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less to the party by unauthorized interference of others. The first case I shall refer to is the *Croton Turnpike Company v. Ryder*, 1 John. Ch. R. 611, where Chancellor Kent held it to be settled that any injunction is the proper remedy to secure to a party the enjoyment of a statute privilege of which he is in the actual possession and when his legal title is not put in doubt. The English books, he observes, are full of cases arising under the branch of equity jurisdiction, but it was unnecessary to enter into a discussion of them, for the point had been then recently settled in this state on an appeal in the case of *Livingston v. Van Ingen*, in error before referred to. The jurisdiction he considered very benign and salutary: for, without it, the party would be exposed to constant and ruinous litigation as well as to have his rights excessively impaired by frauds and evasion.

The case referred to, *Livingston v. Van Ingen*, deserves a further notice, as being peculiarly applicable to the one in hand. It arose out of the grant of the legislature to Messrs. Livingston and Fulton of an exclusive right to navigate the water of the Hudson by steam-boats for the period of thirty years. The defendant, disregarding that act of the legislature, built and put a steam-boat upon the river in opposition to the complainants. They filed their bill for an injunction; and upon an order to show cause before the then chancellor, Lansing, he refused the injunction—upon which the complainants appealed to the court for the correction of errors.

The defendants insisted that the grant was void on two grounds. First, that it interfered with the then power, which belonged entirely to congress, to promote the progress of science and useful arts, by securing to authors and inventors the exclusive right for limited times; and, second, that it interfered with another power vested in congress by the constitution, viz., that of regulating commerce with foreign nations and among the several states—and, furthermore, that if the grant was such as the state legislature had a right to make, that the complainants should be left to the remedy which the legislature had in the act itself provided, viz., a forfeiture of the boat; and that, at all events, the court of chancery ought not to interfere by injunction, until these questions of law were determined and the right to the ex-

clusive navigation of the river was established. It was, however, decided, by the unanimous opinions of the judges, to be a proper case for the interference of the court by injunction, even in that preliminary stage of the cause. That the chancellor ought to have granted it; enjoining the defendants until the hearing of the cause; and then to be made perpetual, if the claim should be sustained: and the cause was remitted to the chancellor with directions to issue the injunction. Although, some years afterwards, the Livingston and Fulton monopoly of steam-boat navigation in the waters of New York was destroyed by the decision of the supreme court of the United States, in the great case of *Gibbons v. Ogden*, 9 Wheaton R. 1, upon the constitutional objection of its grant being repugnant to the power vested in congress to regulate commerce which was held to be exclusively there, and no part of which could be exercised by a state; yet that decision did not reach the point of chancery jurisdiction to sustain a statutory right or privilege under a supposed valid grant by its injunction, and that, too, in the inception of the controversy before the merits can be finally determined. So far from its impugning the doctrine of the state court upon that subject, the same high tribunal in the case of *Osborn v. The Bank of the United States*, decided, at the same term, 9 Wheaton 739, that an injunction was properly granted to prevent the franchise of a corporation from being destroyed, as to restrain a party from violating it, by attempting to participate in its exclusive privileges. The remarks of chief justice Marshall in his opinion of that case, on pages 841, 842, have a strong bearing in more respects than one on the case in hand.

In *The Newburgh Turnpike Company v. Miller*, 5 John. Ch. R. 101, Chancellor Kent again holds to this general doctrine that where one has a grant of a ferry-bridge or road, with the exclusive right of taking tolls, the erection of another ferry-bridge or road so near it as to create a competition injurious to such franchise is, in respect to such franchise, a nuisance: and this court will grant a perpetual injunction to secure the enjoyment of the statute franchise and prevent the use of the rival establishment. I may safely rest upon these authorities as perfectly decisive of the present

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application: for I know not how to distinguish this case in principle or on what ground to place it where it will be beyond the reach of their direct influence.

It is unnecessary, therefore, to consider very particularly another ground on which the extraordinary powers of a court of equity are sometimes invoked. It is this—that supposing that the complainants have not the exclusive right to perform the duties which port wardens have been accustomed to perform, yet being organized as a board or public office, the defendants have no right, with the motives and intentions imputed to them and not yet denied, to establish a rival office with a precisely similar organization for doing business. That although they have adopted a different name, it is such an assimilation of their business and calling with that of the complainants as is calculated to mislead the public and to produce deception and fraud. Numerous cases have occurred of that character in which the court both here and in England has promptly interfered to prevent the mischief. One of the most striking is the *Omnibus case*, 2 Keen's R. 213, cited by Chancellor Walworth in *Bell v. Locke*, 8 Paige's C. R. 76. There, an injunction was granted and sustained upon an appeal, to prevent the defendant from running an omnibus, having upon it such names, words and devices as to form a colorable imitation of the words, names and devices which had been previously placed on the omnibusses of the plaintiffs with the evident intention of obtaining a part of the business by misleading and deceiving the public. According to the bill of the port wardens, their case would seem to be brought within that principle: but it is not necessary to place the decision which I am now called upon to make upon that ground. The other view of the case which I have endeavored to present entitles the complainants, in my opinion, to an injunction, though not to the full extent prayed for, inasmuch as the defendants individually have a right in common with all other citizens to be employed to make surveys to appraise damages and arbitrate whenever called upon or requested to do so by the mutual consent of the owner or consignee and the domestic or resident underwriter upon vessels or goods arriving damaged or becoming damaged in port where all parties in interest

are present and think proper to dispense with a regular and official survey by the port wardens and to employ them in their private capacities as citizens or individually to perform the service; with this modification or exception the injunction must go as prayed for.

There is another objection rather of form than of substance which was taken upon the argument and must not be entirely overlooked. The objection is that the bill is erroneously filed in the individual names of the master and wardens and their clerk and should be in their corporate name. This objection I think is not well taken. They are a corporation for certain purposes, that is to say, they have a name in law by which they may sue for fines and penalties which the law itself imposes in certain cases. But in all other cases and in all matters of business they are so many individuals associated together for one common object in which they are all interested and the income and emoluments of which are equally divided among them. They have a common benefit and bear a common burthen as partners; and for any injury or disturbance which affects that common interest, I can perceive no difficulty in allowing them to pursue the appropriate remedy in their own proper names.

1843.

TYACK  
v.  
BROMLEY.

*Note.*—This case was carried to the chancellor on an appeal; and while pending before him, the act of March 29, 1844, was passed (Laws of 1844, ch. 89, p. 81,) declaring the rights and for the relief of the master and wardens of the port of New York. By that act, the defendants, as well as all other persons, are expressly prohibited from performing or exercising or attempting or offering to perform or exercise any of the powers, functions or duties of the master and wardens of the port of New York conferred on or required of them by law or by the act of February 1819, or to receive any fee or reward for any such service—which powers, functions and duties are declared to be exclusively vested in and to belong to the master and wardens of the port of New York by virtue of their office. Under that act whatever the complainants are authorized to do by virtue of their

1843.

TYACK  
v.  
BROMLEY.

office the above defendants and all others are prohibited from doing under a heavy penalty.

The chancellor, however, gave an opinion, recognizing the decision of the vice-chancellor, except on one point; and that was, in relation to the right of the wardens, as *ex officio* surveyors, to survey "all damaged goods brought into the port of New York in any ship or vessel." They had that exclusive right by the provisions of the act of 1759. It was incorporated into § 8 of 1784 (1 Greenl. 89); and the above words were contained in § 308 of the revised act of 1813, (2 R. S. of 1813, p. 459.) But from intention or accident, the words were left out in the law of 1819. The chancellor considered that the statement of a tariff of fees in the last mentioned act, while it showed that the wardens were not prohibited from acting in cases not expressly marked by the statute, yet that the fixing of such a tariff did not give the complainants the exclusive right to such service or allow them to enjoin others from performing similar services.

As to the main question, his honor observed :

"I agree with the vice-chancellor that the powers given to the complainants by the fifth section of the act of February 1819, (Laws 1819, p. 13) were in the nature of a franchise and in their nature exclusive, until the legislature should think proper to repeal or modify the law or should authorize others to perform the same duties. The statute creates or provides for the appointment of public officers and devolves upon them certain powers and duties which the interest of the public requires should be performed by persons duly authorized and selected in the mode prescribed by the sovereign power of the state. It was a palpable usurpation of power, therefore, for another body of men to attempt to perform the duties assigned to these officers under a different name of office and to establish a tariff of fees of office for the discharge of such duties.

"I have no doubt that the chamber of commerce and the board of underwriters of the city would be perfectly safe persons to entrust with the selection of officers to perform these particular duties. But, the sovereign power of the state had not thought proper to entrust them with that power. They, therefore, mistook the duty which they owed to that

sovereign power, when they assumed to constitute a board of public agents to discharge the duties which the legislature had conferred upon a board of officers to be appointed by the governor and senate."

1843.

BEERS  
v.  
THE CHELSEA  
BANK.

BEERS v. THE CHELSEA BANK.

A receiver is not to be discharged on his own application, where his duties are not ended, unless he shows good cause, especially where it might affect parties. His mere desire, though coupled with a statement of complication of accounts and the necessity of losing much time in the business of his receivership, is not sufficient.

PETITION of Mr. John E. White to be discharged from his duties as receiver of the Chelsea Bank. It showed that, although all or nearly all the property of the Chelsea Bank which had come to the hands of the petitioner, as such receiver, had been sold and disposed of and the proceeds applied under the order of the court, yet, it would take much time and labor and require, probably, a long and protracted investigation, in consequence of the complicated nature of the accounts of the bank, to close its affairs and those of the receiver. That the petitioner, in consequence of the pressure of other business engagements and being wholly unable to ascertain from the books of the said bank a full knowledge of all its transactions, was unable to close the business of the said bank advantageously; and it was, therefore, desirable and for the benefit and interest of the estate and effects of the said the Chelsea Bank, that another receiver should be appointed in the place and stead of the petitioner.

June 16,  
1843.

Receiver.  
Practice.

Mr. *White*, for the petitioner.

Mr. *Doyle*, for a creditor, opposed.



1843.

BEERS  
v.  
THE CHELSEA  
BANK.

THE VICE-CHANCELLOR:—It is by no means a matter of course to change a receiver upon his own application. He must show some reasonable cause why he should be relieved from performance of duties which he has voluntarily agreed to perform; and then he will be entitled to costs of his application: 6 Mad. C. R. 266; Edwards on Receivers, 547; and, especially, should this be required where his discharge and the appointment of another in his place may inconvenience parties in interest and third persons. I consider that the receiver has not shown sufficient grounds to be discharged. The reasons assigned are only such as might excuse every man of business and person of capacity for such a trust from accepting it or, if taken, from going through with the duties of the appointment. Mr. White must, consequently, continue to act until the objects of his trust are accomplished.

The prayer of his petition is denied.

1843.

PETERS  
v.  
MORTIMER.

PETERS v. MORTIMER.

Although there may be a defence to an action at law in a matter of usury, yet, a bill will hold to compel the giving up of securities left as collateral security for the usurious debt and an injunction will be a consequence to stay the action.

THIS case came up on an order to show cause why an injunction should not issue.

By the bill, it appeared, that the defendant Richard Mortimer, in the month of November one thousand eight hundred and thirty-nine, had money to loan; and that the defendant, John R. Peters, was desirous of borrowing three thousand dollars until the spring of the next year; and offered to the defendant, if he would make such loan, to allow two per cent. per month for forbearance and to deposit three certificates of deposit of the Southern Life Insurance and Trust Company made out for one thousand dollars each. The defendant consented to make the loan, provided the complainant would get friends to endorse the certificates, which he did, procuring the endorsements of O. Holmes and Fellows, Wadsworth and Co. On the loan, the defendant claimed and insisted on the payment of about seventy-six 52-100 dollars more than the two per cent. per month, (such sum and the two per cent. amounting to three hundred and forty-three dollars,) the defendant giving, at the time, as a reason for the additional charge of seventy-six 52-100 dollars that he was obliged to run the risk of the usury laws and that there might be more danger in such a transaction than in the purchasing of notes of strangers in the street. The money not being paid in the spring, the defendant threatened suit; and did commence an action against the said Fellows, Wadsworth & Co. the endorsers of the certificates, which stood ready for trial.

The complainant's bill charged usury; waived any answer under oath; and prayed that the said defendant might be decreed to surrender and give up to the complain-

June 27.  
1843.

Pleading.  
Bill.  
Usury.  
Jurisdiction.  
Injunction.  
Delivering  
over securities.

1843.

PETERS  
v.  
MORTIMER.

ant the said three certificates of deposite ; discontinue the said action ; and discharge the complainant and his endorsers from all liability, &c. Mortimer was the only defendant in the bill.

Mr. *O'Connor*, on showing cause, insisted that the endorsers, composing the firm of *Fellows, Wadsworth & Co.* should have been made parties and that they would have power to *non-pros* in the actions at law, if the defendant here were restrained in it ; and that the bill asked for no discovery, while usury was a good defence at law : *Mitchell v. Oakley*, 7 Paige's C. R. 68 ; *Perrine v. Striker*, Ib. 598 ; *Folsom v. Blake*, 3 Edwards' V. C. Rep. 442.

Mr. *D. E. Wheeler*, in reply. The object of the bill is to get back the securities.

On any motion for judgment of *non-pros*, it would be a good answer by the defendant that he was enjoined in his actions by *John R. Peters*, the complainant.

July 22,  
1844.

THE VICE-CHANCELLOR :—One object of this bill is to obtain a surrender or delivery up of three certificates of deposit which may be valid instruments in the hands of the complainant against the *Southern Life Insurance and Trust Company*. If there be usury in the transaction between the complainant and defendant, it does not affect the securities as against the company.

The alleged usury may, for any thing appearing to the contrary, be proved on the trial at law. The bill waives all discovery from the defendant ; but a trial and even the defeating of the action at law would not answer the purpose of this bill. In order to obtain the object required, namely, a delivery up of the securities, it will be necessary and right that this court should assume jurisdiction and grant an injunction.

Order, that an injunction issue ; and that the bond which has been filed remain as a security.

WALWORTH v. ANDERSON *et al.*

1843.

WALWORTH  
v.  
ANDERSON.

Where a resale was obliged to be had owing to the solicitor and master not having attended sufficiently in selling to a description of the premises as contained in the decree, the court refused to the solicitor his costs on the motion discharging former purchasers and to the master his costs and advertising of the first sale.

DECREE for sale of premises, mentioning a party wall. No reference was made to it at the time of sale ; the purchasers refused to take the property ; and they were let off by the court—and on the nineteenth day of April 1843, a re-sale was ordered. The master was required expressly to explain the matter of this party wall in one of the conditions of the re-sale.

June 27,  
1843.

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Sale and
Re-sale.
Master.
Solicitor.
Costs.

The ultimate sale did not nett near so much as the prior one ; and on a present motion for confirmation of the master's report, a question was mooted as to allowing any costs in relation to the vacated sale.

THE VICE-CHANCELLOR :—It is now evident that the infants to whom the money in this case belongs, have been seriously prejudiced by the re-sale. The court was obliged to relieve the former purchasers, because of the loose manner in which the property had been put up and sold. This was the fault of both solicitor and master. The description of the property as given in the mortgage and in the decree, speaking as it does of a party wall, was sufficient to have put them on inquiry as to how the property should be sold with reference to party walls or other circumstances which might affect the sale ; and yet no inquiries were made and no heed taken of the fact—leaving the purchasers in the dark and to find out afterwards that they had been misled. Under these circumstances, I think the solicitor for the complainant must forego his costs on the motion to discharge the purchasers and of the order for a re-sale ; and that the master must, also, be content to receive the costs and expenses of only once advertising and selling the property.

Order, therefore, that the present sale be confirmed ; and
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1843.
 ~~~~~  
 GREGORY  
 v.  
 VALENTINE.

that the master take, out of the proceeds, only the costs of advertising and selling the property as directed by the order of the nineteenth day of April one thousand eight hundred and forty-three, including his commissions upon the latter sale and that the complainants' solicitor be allowed no costs upon the motion to discharge the former purchasers or for the re-sale.

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GREGORY v. VALENTINE.

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A defendant in a bill filed by a judgment-creditor cannot be compelled to discover property to a later date than the filing of the bill. If a discovery to a later date is required, a supplemental bill should be filed.

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July 5,  
 1843.  
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Pleading.
Debtor and
Creditor.
Answer.
Exception.

JUDGMENT creditor's suit; and exceptions to the answer: 1st, on the ground that the bill required the defendant to answer as to property up to the time of filing his answer; and, 2nd, that he had not sufficiently set forth the value and particulars of his wearing apparel.

Mr. Garr, for the complainant.

Mr. Alexander Wells, for the defendant.

Oct. 16. THE VICE-CHANCELLOR:—The master has fallen into an error in supposing that the defendant was bound to answer whether he had property at the time of putting in his answer, although his answer contains a full denial of any property at the time of the filing of the bill. Taking that denial as true or not disproved, the complainant can have no decree against the defendant upon the present bill, although it may turn out that the defendant was possessed of or entitled to subsequently acquired property. It is immaterial to the present bill whether such is the fact or not. If the complainant has reason to believe there is after-acquired proper-

ty he must resort to a supplemental bill in order to discover and have it applied.

Nor is the present bill to be considered as calling for a disclosure of property at the time of putting in the answer, except it should be of such property as he also had at the time of the filing of the bill and on which the complainant had thereby acquired a lien. When such property is disclosed, it is proper the defendant should be required to say whether it is still in his possession or how otherwise at the time of answering, in order that it may be delivered over or traced and be taken possession of or recovered by a receiver. This, I consider to be the legitimate purpose of the call in the bill for a discovery of property "as well at the time of filing the bill as until and at the time of filing his answer thereto," showing that a *continuando* is meant; and that he may answer "with express reference as well to the one time as the other" does not vary or enlarge the meaning. For these reasons, I am of opinion that all these exceptions, namely, the first, second, third, fifth and sixth exceptions, should have been disallowed. There is nothing to show that the service of the subpoena was on a day different from the day of filing the bill and that point taken in the fifth and sixth exceptions and in the argument is, therefore, of no avail.

The fourth exception turns upon a different point, namely, that the defendant has not disclosed the particulars nor the value of his wearing apparel. I have, heretofore, repeatedly decided that the defendant is bound to do this, under a call to set forth (as in this bill) the nature, amount and value of all his property; and that he cannot, as in this instance, excuse himself by determining for himself that it is his necessary wearing apparel: *Brown v. Montgomery*, 3 Edwards's C. R. 278. This exception was properly allowed.

Order, &c.

1843.

GREGORY
v.
VALENTINE.

1843.

HOLLEY
v.
S. G.

HOLLEY and others v. S. G. and others.

Commissions, in the two-fold capacity of executor and trustee, not allowed. *It would seem*, that where there is no direct and pointed allegation of misconduct in the bill against executors lending money upon insufficient security or contrary to the directions of the will, they will not be held personally liable on a reference to account where a loan has been made on personal security.

Where a beneficiary under a will had liberty to draw out a specified sum, but passively chooses to let it remain undemanded in the executor's hands, such beneficiary cannot, afterwards, claim interest upon it.

July 12,
1843.

ON exceptions to master's report. The points sufficiently appear in the opinion of the court.

*Executors
and Trus-
tees.
Commis-
sions.
Interest.*

Mr. J. Blunt, for the parties excepting to the report.

Mr. H. E. Davies, in opposition.

Feb. 13.

THE VICE-CHANCELLOR :—All parties have acquiesced in the master's report, but Samuel, who has taken five exceptions, and Sarah and Martha who have taken two. Samuel first excepts, because the master has not allowed him commissions for receiving and paying the income of the estate as trustee under the separate trusts created by the will. The master has allowed him commissions as executor; and the rate and manner of compensation are such as the statute has prescribed and the repeated decisions of the court have sanctioned. The reasons assigned by the master against the allowance of commission, in the two fold capacity of executor and trustee, are very satisfactory.^(a) This exception must, therefore, be disallowed.

The second and third exceptions seem to be entirely unfounded in point of fact. At least, I am unable to discover, from the papers before me, the particular items or parts of the accounts to which they relate. Both must be overruled.

The fourth exception is the important one; and it presents

^(a) And see *Valentine v. Valentine*, 2 Barbour's Chancery R. 430.

the question, whether the executor, Samuel, can be charged with the bad debts created by the loan of monies to Ward ? The master, it appears, was doubtful whether he could go into the subject under the bill and the order of reference and objections laid before him to the accounts which he was to pass upon. The bill contains no specific allegation of misconduct of the executors in lending money upon insufficient security or contrary to the directions of the will. In *Smith v. Smith*, 4 Johns. Ch. R. 286, Chancellor Kent has said, that guardians, executors, &c. are not to be answerable for breaches of duty not alleged in the bill. There is, in the bill in this cause, the general allegation that the complainants have discovered, from inspection of the executor's books, great and manifold acts of improper conduct on the part of the executors, and of misapplication of the funds of the estate ; but, the specifications, in support of this, make no mention of loans contrary to the directions of the will or upon insufficient securities. Nor is there anything in the consent order of the ninth of July, one thousand eight hundred and thirty-nine (by which Thomas was appointed to take and state the accounts of the estate, &c.) authorizing an inquiry into any such improper conduct. The compromising spirit and tenor of that order would seem to forbid it ; and I think the parties must be deemed to have waived all claim upon the executors or either of them personally to make good any loss from such cause. Besides, if this matter could properly be inquired into under the order and amicable proceedings in the cause, it is, at least, doubtful, on the testimony, whether Samuel ought to be charged individually with the loss of the Ward debt. Though the loan was made, in the first instance, upon personal security, yet, security by mortgage was afterwards obtained and which, at the time, was deemed sufficient. This might have excused the executor from a loss arising from a subsequent and unforeseen depreciation. Upon the whole, therefore, I am of opinion that Samuel's fourth exception is well taken and must be allowed ; and relieving him from this loss, the balance reported against Samuel must be reduced to sixteen thousand six hundred and seventy-two dollars and fifty-six cents as suggested and shown by the report itself.

1843.

HOLLEY
v.
A. G.

1843.

HOLLEY
v.
S. S.

The fifth exception will be obviated by directions in the decree, based upon the report as now confirmed.

Then, as to the two exceptions of Sarah and Martha, because they have not been allowed interest on the three thousand dollars, which each was entitled to draw out of their shares of the estate devised in trust and on the distributive share of the deceased sister Elizabeth.

The three thousand dollars to each is not given as a legacy payable at the age of twenty-one and therefore entitling them to interest if not paid when due, but it is a sum which they might call for and receive to themselves out of their trust shares, free from the trust created by the will; and if they did not receive the money, it must be supposed to be from choice and they cannot claim interest upon it as upon a payment which was withheld from them. So long as the money remained in trust, they would be entitled and I presume have been allowed the income from it as a part of their trust estate. So with respect to the distributive shares of the deceased sister's portion. If they do not receive interest on them now specifically as such, they get it in the shape of income as upon the trust fund. These exceptions are overruled.

Order, overruling all the exceptions to the master's report except the fourth taken by Samuel. The report modified, &c.

1843.

BANK COMMISSIONERS
v.
LA FAYETTE
BANK.

BANK COMMISSIONERS OF THE STATE OF NEW YORK v.
THE LA FAYETTE BANK.

Interest allowed on bank notes from the day of demand out of the surplus effects of a bank in a receiver's hands; such bank having been wound up through this court, but not on the ground of insolvency.

A RECEIVER had been appointed of the money, property and effects of The La Fayette Bank of the city of New York; and an order was, thereafter, entered, authorizing such receiver to pay in full, without interest, all the debts and demands of the bank. This had been done. A surplus still remained in the receiver's hands, which would go to the shareholders.

July 27.
1843.

Interest.
Bank
notes.
Receiver.

A petition of the American Exchange Bank now came before the court, suggesting the right to *interest*. The petition showed that, on the nineteenth day of February one thousand eight hundred and forty-two, the petitioners were the *bona fide* holders and owners of divers bank bills issued by the La Fayette Bank, amounting to three thousand and eighteen dollars; that on the said nineteenth of February, the petitioners caused due demand to be made at the banking house of the La Fayette Bank for the payment of the said bills and that payment thereof was then and there refused; that they continued to be the holders; that, under an order, payment of the bills had been made by the receiver, exclusive of interest; that the petitioners received the principal monies without prejudice; and that there were still sufficient funds in the receiver's hands to pay the interest. *Prayer* accordingly.

Mr. *Titus*, for the petitioners.

Mr. *Bonney* and Mr. *Roe*, *contra*.

THE VICE-CHANCELLOR :—This claim for interest is not within the 31st section of the act incorporating the La

Sept. 26.

1843.
BANK COMMIS-
SIONERS
v.
LA FAYETTE
BANK.

Fayette Bank, giving ten per cent. by way of damages in lieu of interest for the non-payment of their evidences of debt upon demand and refusal. That section is not intended to apply where the affairs of the bank come to be wound up under the general safety fund act.

Nor is this case within the entire exemption from interest under the 14th section of the safety fund act, because this bank is not insolvent and has not been proceeded against as an insolvent institution. But it is a case, in my opinion, in which the petitioners and all other bill holders, who took the precaution to have the bills of the bank presented and payment demanded, are entitled to the ordinary lawful interest of seven per cent. from the time of demand until actual payment of the principal.

The receiver must, therefore, pay such interest on the bills in question.

Order accordingly.

1843.

LEAVITT
v.
BALDWIN.

LEAVITT, LORD and ROBINSON v. BALDWIN and another.

Where one of several complainants urges on a suit after he has taken the benefit of the bankrupt act and costs accrue, these are not recoverable out of after acquired property.

THE complainants (a firm) had become insolvent; and one of them, William Robinson, had applied for and he, eventually, took the benefit of the bankrupt act.

Sept. 13.
1843.

Practice.
Bankrupt.
Costs.

A motion had been made, on behalf of the defendants, that the complainants, on the ground of their insolvency, should give security for costs; this was allowed and an order entered on the fifteenth day of September one thousand eight hundred and forty-two, requiring such security and authorizing the defendants to apply to dismiss the bill if the same were not given; and all proceedings on the part of the complainants were to be, in the meantime, stayed, except that the complainants were at liberty to proceed with the examination of witnesses for the same number of days after the service of the order that they had when the examination was suspended.

Security for costs was not given; the bill was, therefore, dismissed, and the defendants solicitor, on or about the twenty-first day of July one thousand eight hundred and forty-three, issued a *fi. fa.* for them; and under it certain personal property, belonging to the complainant, William Robinson, was levied upon by the sheriff of New York.

It was in the month of February one thousand eight hundred and forty-two that Robinson applied in bankruptcy; on the twenty-third day of July thereafter he had been declared a bankrupt; and on the fifteenth of August thereafter he obtained his discharge under the bankrupt act.

A motion was now made to discharge the *fi. fa.*

It appeared, in opposition, that the suit had been urged on by Robinson, but his co-complainants disclaiming it. And an affidavit was read (made by the solicitor for the defendants) showing, among other things, the following: "This deponent has carefully examined the petition and

1843.

LEAVITT
v.
BALDWIN.

schedules in bankruptcy and there is not, therein, any item for the costs in this suit or for his liability for the same; nor was any notice given to the defendants to show cause against his," Robinson's "discharge. Deponent further saith that said Robinson was declared bankrupt in April, 1842; but this deponent saith that, after the said decree of bankruptcy, this suit was still prosecuted by E. W. Chester, Esquire, the solicitor of said Robinson in this suit and for the account of the said Robinson; and that the general assignee in bankruptcy, W. C. H. Waddell, Esquire, disavowed, under his official certificate and signature, all agency or interest in the suit and refusal to have any thing to do with it. That, nevertheless, the said suit was prosecuted with the full knowledge of said Robinson, by his solicitor aforesaid. And the said Robinson, during the examination of witnesses, on the part of the complainant in this cause in July last, attended the examination, at least, once personally; and that a great part of the costs in this suit have accrued since the first decree in bankruptcy declaring said Robinson a bankrupt."

Mr. *E. W. Chester*, for the said William Robinson.

Mr. *J. B. Staples*, for the defendants and in opposition to the application to discharge the *fi. fa.* made the following points:

1. Where a party having commenced a suit, afterwards obtains a discharge under the act and then a judgment as in case of non-suit is rendered against him for not going to trial, his discharge is *no bar* to an action to recover the costs on such judgment: *Stebbins v. Willson*, 14 John. 403. See also *Buel v. Gordon*, 6 Johns. R. 126.
2. A discharge under the act of a defendant who had signed a bond as surety for a deputy sheriff, is not a good plea in bar, as the damages sustained in consequence of the breaches of the condition of the bond were not then ascertained: *Andrews v. Waring*, 20 John. R. 153. See 2 Wend. 248.
3. As a general rule a discharge under an insolvent law

or under the English bankrupt act does not discharge a debtor from claims that are unliquidated or entirely contingent and not capable of being ascertained, as is the present case.

1843.

LEAVITT
v.
BALDWIN.

THE VICE-CHANCELLOR :—The decree and discharge in bankruptcy exonerates the complainant Robinson from liability for the costs of this suit. The provisions of the bankrupt act are broader and go further towards discharging uncertain demands and contingent liabilities than our state insolvent laws.(a)

Sept. 26.

The writ of *fi. fa.* for the costs of this suit and the levy by the sheriff, so far as it affects the complainant Robinson and his goods, must, therefore, be set aside ; but, under the circumstances, without costs of this motion—each of the parties being left to bear his own costs.

Order accordingly.

(a) And see *Scott v. Ambrose*, 3 Maule & S. 326.

1843.

EDWARDS
v.
BODINE.

EDWARDS and another v. BODINE and others.

Items of damage allowed on a bond given under the 31st rule, on granting an injunction to restrain the sale of mortgaged premises.

Oct. 2,
1843.

Injunction.
Bond under the 31st rule.
Damages.
Practice.

In this suit, the injunction master, on allowing an injunction to restrain the defendants from proceeding to sell mortgaged premises under a decree of foreclosure, took from the complainants a bond with sureties, conditioned to pay to the parties enjoined such damages as they might sustain by reason of the injunction (according to the provisions of the 31st rule.)

The injunction not being sustained, the defendants obtained an order, referring it to a master to ascertain their damages by reason of the injunction.

The master, in addition to the loss of interest on the amount for which the property would have been sold and the taxable costs of the master who was to have sold the property and the expenses of advertising, &c., allowed, for the half commissions on the amount of the decree, twenty dollars for the services of the defendants in attending the sale and employing counsel to get the injunction dissolved, ten dollars to the defendants solicitor attending at the time of the intended sale, and one hundred dollars for counsel fees on procuring the dissolution of the injunction.

Exceptions were taken to the report.

Mr. *Van Cott*, for the complainants.

Mr. *Kinney*, for the defendants.

July 15,
1844.

THE VICE-CHANCELLOR:—The 31st rule, requiring a bond on the granting of an injunction was adopted in consequence of the occurrence of such cases as *The Cayuga Bridge Co. v. Magee*, 2 Paige's C. R. 116, and *Sullivan v. Judah*, 4 Ib. 444. It is to protect where the injunction suspends the prosecution of some work or keeps the party en-

joined out of the possession or restrains him from the enjoyment of property to which he is entitled and the temporary deprivation of which might cause him some actual loss or injury.

1843.

EDWARDS
v.
BODINE.

In this view of the object of the rule and of the bond, the defendants, in the present case, are entitled to recover all such damages as have resulted from or been consequent upon a suspension or delay of the sale of the mortgaged premises by means of the injunction; and which, but for such suspension or delay, would not have fallen upon the defendants.

Thus, the master's fees for drawing the advertisement of sale, attending the sale, drawing the terms of sale, and the expenses of advertising and posting notices of sale are properly chargeable as items of damage; because, in consequence of the stop put to the sale at that time, it falls upon the plaintiffs in the mortgaged suit and must be lost to them, unless, indeed, the property should afterwards sell for enough to pay these expenses together with the debt and costs. There is no proof that the property has produced or will produce enough for that purpose. The defendants are not, however, entitled to recover the master's charge of ten dollars for half commissions for the reason that the master is not entitled to that compensation in this case. It is not within *Rule 124*, regulating the allowance of commissions. The charge of one hundred and forty-five dollars and eighty-three dollars, for the use and occupation of the premises during the time of the suspension and delay of the sale, may properly be allowed as an item of damage or loss, unless, indeed, it had been made to appear that the whole of the mortgage debt, interest and costs had been or would be produced by a sale. So, likewise, the defendants might have claimed, as damages, any diminution or difference in the price of the property at the time of the sale and what it would have brought at the sale which was interrupted by the injunction. However, the defendants have waived, in the order of reference, any claim on that score; because, as I suppose, no difference in the price or loss on that account could be made to appear.

Then, as respects the solicitor's fee of ten dollars for at-

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tending at the time and place appointed for the sale. It does not appear that the defendants were under any necessity to incur this expense; and, if they deemed the presence of their solicitor necessary at the sale, it is very certain they could not have expected his charge for attendance would have been reimbursed them by the complainants. There is no such fee taxable against the mortgagor or payable out of the proceeds of sale. Solicitors generally feel it to be their duty to attend the sales under decrees in their own suits where the sale takes place in the city or town in which they reside, without making an extra charge for it. At least, I have never understood that it is customary for them to make such a charge against their clients, and if made in any instance, it certainly must be borne by the client. I cannot consider this an item of loss or damage covered by the bond.

So, with respect to Mr. Van Pelt's charges for travel and attendance at the time of the proposed sale, and subsequently about consulting and employing counsel, amounting, altogether, to twenty-five dollars. I cannot believe that these fall within the bond. A party to a suit, as Mr. Van Pelt was, is never remunerated and never expects to be, by his adversary for trouble and expense of travel and attendance on courts or on counsel or at places where the business of the cause may call him. If the sale, in this instance, had not been prevented, his attendance would have been the same as it was and he would have got no compensation for his journey, from the mortgagors or out of the property—and there is no just reason why he should be allowed to receive it through the bond.

The two counsel fees of fifty dollars each, for procuring a dissolution of the injunction, stand on the same footing. Taxable costs, on such motions, are or may be awarded against the adverse party, but our laws have not provided for the recovery of counsel fees by one party to a suit against another; and I consider that the bond in question is not to be construed as applying to or covering such demands.

The utmost that the defendants are entitled to, by way of damages payable by the bond, will be: the master's costs and charges (excluding his half-commissions) amounting to

twenty-two dollars and thirty-five cents, and the one hundred and forty-five dollars and eighty-three cents for use and occupation, making together one hundred and sixty-eight dollars and eighteen cents.

Order: that the master's report be modified and the exceptions taken thereto be so far allowed as to reduce the amount of damages sustained by reason of the injunction to one hundred and sixty-eight dollars and eighteen cents; and, on payment of that amount, the bond to be cancelled—or, if not paid within twenty days, that it be delivered over for prosecution. Each party to bear their own costs of the reference and of the hearing on the exceptions.(a)

(a) On an appeal from this order, the chancellor varied it so far as to allow the counsel fees. His Honor also observed, that the fees for services in relation to the sale which the master would have to perform the second time, in consequence of the sale being stopped, the expenses of re-advertising the mortgaged premises and so much of the taxable costs as was necessary to obtain a dissolution of the injunction, were properly allowed by the master as part of the damages sustained by the issuing of the injunction.

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No decree can be had in a divorce suit where the only acts proved have occurred not within the period alleged in the bill, but after it was filed.

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Divorce.

BILL for divorce *a vinculo matrimonii*. On the coming in of the master's report,

THE VICE-CHANCELLOR said:—The bill in this cause was verified, according to its *jurat*, on the eighth day of January one thousand eight hundred and forty-two and probably filed about that time. It charges, generally, the commission of adulteries as committed between the time of the marriage and the year one thousand eight hundred and thirty-seven and the filing of the bill. The master has taken testimony of two specific acts of adultery committed by the defendant in the months of July and August one thousand eight hundred and forty-two, long after the time of filing the bill. This proof relates not to the allegations charged as facts in the bill and, of course, no decree can be had upon them.

The bill must be dismissed.

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DE MOTT v. BENSON and others.

Where a bond and mortgage are given on a settlement of accounts, balances being struck and assented to at the time, they are *prima facie* evidence of the amount; and when the mortgagor denies the extent of amount, the burthen of proof is on the latter—on the principle of surcharging and falsifying. And where (as in the case before the court) there is no general order or decree throwing open the accounts and allowing a general accounting, the defendant is only at liberty to surcharge and falsify as to the particular items pointed out by his answer; and cannot have the benefit of error in other items, although, on a reference, they may be apparent.

In matters of account before a master, the defendant's answer (on oath) is evidence so far as it is responsive to the complainant's bill.

An exception to a master's report, depending on matter of fact which does not appear upon its face, must be overruled.

Bill by mortgagor not setting forth the origin of the debt, but the answer showing how it was made for a balance of account, yet denying the amount to be due:—In such a case,—the court having arrived at the conclusion that such was its origin, *It was held*, that the onus of proof, to rebut amount, was on the defendant.

An irregularity in a master's office, in a matter of practice connected with his report, is to be corrected by motion and not through an exception.

Where a mortgage is given professedly for an account which had yet to be adjusted and the mortgagor, by his answer, showed that he had repeatedly attempted to obtain a settlement without effect and denied that any thing like the amount claimed is due, it is incumbent on the mortgagee to produce accounts and evidence to make out the amount.

BILL for foreclosure and sale of mortgaged premises.

A reference had been had to compute the amounts due on the different bonds and mortgages embraced by the suit.

The great dispute between the parties was, as to the extent of this amount.

The case came before the court on exceptions to the master's report.

The opinion of the vice-chancellor contains sufficient of the facts to make out the principles involved.

Mr. A. Thompson, for defendants.

Mr. L. H. Sandford, for complainant.

THE VICE-CHANCELLOR:—Two of the bonds and mort-
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Mortga-
gor and
Mortga-
gee.
Exception.
Master's
Report.
Master's
office.
Surcharge
and falsi-
fy.
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gages having been given on the settlement of accounts, for balances appearing at the time to be due, they are, *prima facie*, evidence that the amounts, payable by the condition of the bonds, are due.

The defendants undertake to controvert the evidence which the instruments furnish upon their face. The burthen of proof is, then, on the defendants to impeach the consideration, by showing that they were given for more than was due at the time or that they have been reduced by subsequent payments. From the course of proceeding taken in this cause, the defendants, Benson and Myers, are in the condition of parties surcharging and falsifying stated or settled accounts. Their answers, used before the master upon the reference, point out various errors, omissions and false charges in the accounts, which, it is alleged, formed the consideration of the first two bonds and mortgages. The answers are not evidence, however, except so far as they are responsive: for the defendants can have no other benefit from them than from answers replied to. Hence, the defendants' first exception, viz.—“that the master has computed the amount due as upon bill *pro confesso*, wholly disregarding the answers in all respects”—if true, in point of fact, would be well taken; and the case would have to be sent back to the master. But, I do not understand that the master has done so. It nowhere appears that the answers were offered to be read and were rejected or not looked into on the reference. I cannot, therefore, assume such to have been the fact; and as the first exception depends on an alleged matter of fact, which does not appear, it must be overruled.

The second exception insists, that the amount reported to be due on the two first bonds and mortgages is excessive. It appears that the master has allowed the whole of the principal sums payable by the bonds—viz., two thousand five hundred and sixty-one dollars and seventy cents, and one thousand nine hundred and twenty-six dollars and twenty-nine cents, with interest on both, as claimed by the bill from the thirtieth day of October one thousand eight hundred and thirty-seven—and has given credit only for the money admitted by the bill to have been received from Van Lew on account, being five hundred and fifteen dollars

and eighteen cents, and has deducted nothing for errors, omissions and false charges in the accounts, which, the defendants say, formed the principal alleged consideration of these two bonds and mortgages. The first point to be established is, that these instruments were based upon previously existing accounts and were given to secure the balances therefor. The bill is silent as to the origin of the bonds and mortgages, except in stating that Benson became indebted to the complainant in the sums for which they were given and, in order to secure the payment thereof, he executed those instruments and that the whole of the principal sums and the interest, from the thirtieth day of October one thousand eight hundred and thirty-seven (with an exception as to some money received of Van Lew applicable to the interest) are actually due; and it calls on the defendants to answer under oath. The defendants in answering (Benson, of his own knowledge) deny that, at the time of giving the bonds and mortgages, Benson was justly indebted in the sums therein mentioned or to near those sums. Now, this is a responsive denial as to the amount of the indebtedness at the time; but, beyond this denial, the answers going on to state the origin of the bonds and mortgages and the considerations on which they were founded, such as balances of account—and that such accounts were false and erroneous—are not strictly responsive and, therefore, not, of themselves, evidence. Nor is there any direct proof, from the examination of witnesses, to connect these bonds and mortgages with stated accounts in the books of the complainant and of the partnership of De Mott and Sandford in his possession. It is left to inference; but the inference is strong and irresistible. The complainant has not attempted to show the contrary; but has, seemingly, acquiesced in that assertion, by allowing the books to be examined by persons produced as witnesses, for the purpose of tracing out the indebtedness upon the books and showing the considerations on which the bonds and mortgages were founded. As to the bond and mortgage of one thousand nine hundred and twenty-six dollars and twenty-nine cents, it does appear from the books how that sum was made up, corresponding in date, as well as amount, with the bond and mortgage so as to leave no

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doubt of the fact that they were founded upon that consideration. I think it may be safely assumed that the first bond and mortgage was, likewise, given to secure what was originally a book-account indebtedness and for an amount which had been ascertained by the striking of a balance and for which notes had, in the first place, been given, which were cancelled upon the giving of the bond and mortgage. The next point, then, under the same second exception is, whether there were any errors and false and fraudulent charges in the accounts which unjustly swelled the balance and induced the giving of bonds and mortgages for a greater amount than was fairly due? This is strongly asserted in the answer of Benson; and various particulars, both of omission and commission, are set out. The first is, the alleged omission to credit him with the amount of the Rowley-note; but, even supposing the complainant to have received that money for Benson, the evidence fails to prove that Benson has not had credit for it or been allowed the amount in the settlement of one thousand eight hundred and thirty-three or in the previous one, which appears by the books to have taken place in one thousand eight hundred and twenty-seven. The accounts previous to one thousand eight hundred and twenty-seven do not appear to have been investigated. The amount of the note may have been passed to the credit of Benson at that early day. The presumption is that it was so; and it rests with Benson to show affirmatively that he was not only entitled to an allowance for that note, but that, through error or mistake, it has been entirely omitted in any of the accounts. This, he has not done.

The next complaint is that Benson has been charged with compound interest on his account of many years standing, and thus the balance has been swelled which entered into the first bond and mortgage. I find no evidence whatever in support of this allegation of the answer. The next is that, on striking the balance when the first bond and mortgage were given, an item of one hundred and ninety dollars and thirteen cents was charged on the complainant's books and included in the bond and mortgage as and for interest on the balance of an account of about seven hundred and fifty dollars for six months, whereas the interest was only

twenty-six dollars and twenty-five cents and thus an error of one hundred and sixty-three dollars has crept into the accounts to the prejudice of Benson. The testimony of Charles W. Ingersoll, in relation to the excessive nature of this item, is far from being satisfactory. He merely says, he found a charge for interest of one hundred and ninety dollars and thirteen cents on the complainant's ledger which he, the witness, supposes was too much. He supposes the charge ought to have been about twenty-five dollars to thirty dollars. The grounds or reasons for his supposition are not given. The court cannot receive this in evidence of overcharge or mistake. Next, it is alleged that there is a charge on the complainant's ledger against Benson of one hundred and ten dollars and fifty three cents under date of 1st July, 1831, with a reference to a page in the day-book from which it purports to have been posted, whereas no such charge and even no such page is contained in the day-book. This appears to have been a charge for interest like the one hundred and ninety dollars and thirteen cents before mentioned, which is also on the ledger but not found in the day-book. The circumstance that both these items purported to have been taken from the day-book when, in fact, no such entries existed there, was calculated to create a suspicion of the accuracy of the complainant's books and a distrust of the fairness and good faith of the entries on the ledger. The complainant has undertaken to remove this unfavorable impression, by the testimony of Selfridge, a witness examined before the master. He merely proves that, if interest was computed on the principal of annual rests in the accounts from April one thousand eight hundred and twenty-seven to November one thousand eight hundred and thirty-nine, the amount would somewhat exceed the two sums charged on the ledger for interest. It does not appear, however, that Benson ever assented to that mode of making up an interest account or, from the nature and course of dealing, that the complainant was entitled to or claimed interest in that way. Still, as it was incumbent on the defendants to impeach the correctness of those charges by affirmative evidence and as they have failed to produce such evidence, there can be no displacement of these two sums from the mortgage at this

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time. Not so, however, of five other items on the ledger of De Mott & Sandford's books, in which their account against Benson is posted and which account formed the consideration of the second mortgage for one thousand nine hundred and twenty-six dollars and twenty-nine cents, dated on the thirtieth day of October one thousand eight hundred and thirty-seven. These items are glaringly false and erroneous, as appears from the books themselves. The instances are these :—A charge on the day-book of four shillings is posted into the ledger as ten pounds four shillings ; another amount of one pound twelve shillings and six pence in the day-book is posted as eleven pounds, twelve shillings and six pence ; another of two pounds, eleven shillings and five pence is posted as twelve pounds, eleven shillings and five pence ; another of one pound, two shillings and seven pence is posted as eleven pounds, two shillings and seven pence ; and another of one pound, eight shillings and three pence is posted as eleven pounds, eight shillings and three pence. Thus swelling the account fifty pounds or one hundred and twenty five dollars beyond its true amount. This sum should have been deducted at once from the face of the bond and mortgage by the master.

There is some reason to apprehend that other errors of overcharge may have occurred and contributed to swell, unjustly, the amount for which the second bond and mortgage were given. It would seem, for instance, that nine hundred and eighteen dollars and eighty-five cents, charged for interest on the first bond and mortgage, from the twelfth day of November one thousand eight hundred and thirty-three to the thirtieth day of October one thousand eight hundred and thirty-seven and then brought in to help make up the one thousand nine hundred and twenty-six dollars and twenty-nine cents, for which the second bond and mortgage were given, was excessive by about two hundred dollars, unless, indeed, compound interest was calculated. There is no allegation in the answers complaining of that, however, as one of the exorbitances to which Benson has been subjected in his dealings with the complainant, and there is nothing in the proofs to show that Benson may not have agreed to be charged with interest upon interest when it got in arrear.

Other errors of small amount are discoverable on an inspection of the books according to some of the witnesses, sometimes against the one and then against the other of the parties; but these are not the subject of examination at present. There has been no order or decree throwing open the accounts and making the reference which has taken place a matter of general accounting between the parties nor has the production of the books before the master been required. In pointing out errors, by way of surcharge and falsification, the defendants have not specified those additional items to which the witnesses have alluded. They cannot, therefore, be further noticed.

The next question (still under the second exception) is, what amount should be credited to the defendants for the Van Lew bond and mortgage. The master has allowed a credit of no more than the complainant admits by his bill to have been realized, viz: five hundred and fifteen dollars and eighteen cents; and has credited it as applicable only to the interest in arrear on the bonds and mortgages. The evidence is not satisfactory that the Van Lew bond and mortgage were assigned to the complainant in absolute payment and satisfaction of so much of the prior indebtedness. The receipt given on the taking of the assignment has not been produced and, in the absence of that receipt and from the circumstances attending the transaction as far as they are disclosed, the inference is that the bond and mortgage were to apply as payment only so far as money should be collected or realized from them. And the defendants have given no evidence of any thing collected or realized beyond the sum admitted by the complainant. The master could not, therefore, allow any more.

The third exception, in relation to the admissibility of Selfridge and Manning's testimony and the master's refusal to allow an adjournment and the alleged impeachment of Van Lew, is not well taken. If there was any irregularity in the master's office, then, as a matter of practice, the defendants should have moved to correct his proceedings or to set aside his report; but, in no point of view, either as a matter of practice or as to merits, are these objections, in my opinion, sustainable.

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Then, as to the fourth exception, touching the third bond and mortgage dated the first day of July one thousand eight hundred and thirty-nine for four thousand dollars. The master, it appears, has followed the bill ; and allowed exactly what it claims as due upon it, viz : two thousand and twenty six dollars and twenty-one cents of principal, exclusive of any deficiency or balance which might remain of the first two mortgages and which the four thousand dollar bond and mortgage were intended to cover. The question is, whether the master was right in adopting the claim of the bill, without further proof, in the face of the denials in the answer ?

The bill shows that a fresh indebtedness having accrued since the thirtieth day of October one thousand eight hundred and thirty-seven and the complainant having released a part of the premises from the liens of the two previous mortgages, it was agreed to make the bond and mortgage in four thousand dollars, so as to secure, as well such portions of the two prior mortgages as were not secured or were rendered insecure by the complainant's having released a part of the premises, as all other indebtedness of Benson to the complainant ; and, then, it goes on to say, that Benson, being indebted to the complainant in divers sums of money, (not specifying the sums or amounts) made and executed the bond and mortgage for the four thousand dollars. And in a subsequent part of the bill (fol. 108) the allegation is, that, exclusive of the amounts remaining unpaid on the two first bonds and mortgages, there is due (at the time of filing the bill, the second day of October one thousand eight hundred and forty-one) on the third bond and mortgage the sum of two thousand and twenty-six dollars and sixty-one cents or thereabouts. The answer admits the execution of this third bond and mortgage for four thousand dollars ; and says they were executed without any settlement of accounts or the ascertainment of any precise amount due to the complainant, but that the understanding was that the complainant received the bond and mortgage to hold as collateral security for what Benson was indebted to the complainants, if any thing was due to him, first securing what was not then secured by the two previous bonds and mortgages ; that, from the time of giving the bonds and mortgages of the thirtieth

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day of October one thousand eight hundred and thirty-seven, the complainant and Benson continued to have mutual dealings and accounts and, at the time of executing the four thousand dollar bond and mortgage, there may have been some small balance of such accounts due the complainant: but the defendants are not aware there was any such balance due, as he, Benson, has repeatedly and in vain attempted to effect a settlement of said accounts with the complainant. And in a subsequent part of the answer (about fol. 64) the defendants, distinctly and unequivocally, deny that, exclusively of the amount remaining unpaid on the two first mentioned bonds and mortgages, there is or was, at the time of filing the bill due to the complainant on this last bond and mortgage the sum of two thousand and twenty-six dollars and sixty-one cents or any thing like that sum and they verily believe that, on a fair settlement, the balance, if any thing, would be very small. The parties do not appear to differ in any essential particular about the origin of this last bond and mortgage or the object or purposes for which the same were given. They were not given to secure any previously ascertained and specific amount of indebtedness. There had been no examination of the accounts between October one thousand eight hundred and thirty-seven and the first day of July one thousand eight hundred and thirty-nine. No balance had been struck; and the amount of four thousand dollars appears to have been adopted as a nominal sum, sufficiently large, as was supposed, to cover the amount of such indebtedness and to make good the security of the two previous mortgages. It is not alleged in the bill that four thousand dollars was the sum fixed on and agreed to be paid as the debt which was then due or to become due—on the contrary, it is very manifest, from the bill itself, that the bond and mortgage were given for an open account, which was to be the subject of adjustment and settlement afterwards; and the bill does not show that such adjustment and settlement has ever taken place with the assent or concurrence of Benson. It would seem that the complainant, by himself, has undertaken to ascertain how much was due up to the time of filing his bill; but his statement, showing that result, has not been submitted to Benson for his appro-

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val, who swears, in his answer, that he has repeatedly and in vain attempted to effect a settlement of the accounts ; and denies that any thing like the sum claimed is due. Under these circumstances, it was certainly incumbent on the complainant to produce his accounts and furnish some satisfactory evidence of the amount due to him on this bond and mortgage. The production of the bond and mortgage was not evidence of the amount which he was entitled to receive, by reason of the special character belonging to them. Nor is his own assertion in the bill, contradicted as it is by the answer, such evidence.

The burthen was on the complainant to prove the amount really due ; and not on the defendants to prove how much less than four thousand dollars was due : because the mortgage was confessedly given, not to secure a debt of four thousand dollars absolutely, but to cover an unliquidated amount. In this respect, very different from the two preceding mortgages, which were based on balances struck and assented to at the time and, consequently, *prima facie* correct. I think the master has erred in adopting the complainant's demand of two thousand and twenty-six dollars and sixty-one cents as the amount due, without proof and, in reporting that amount with interest exclusive of any deficiency that might arise on the first two mortgages.

The fourth exception must, consequently, be allowed ; and the fifth and sixth, necessarily, follow the allowance of the fourth. My conclusion is—and I shall accordingly order—that the first and third exceptions to the master's report be overruled. That the second exception be allowed in part and disallowed in part,—that is to say, that it be allowed so far as respects the sum of one hundred and twenty-five dollars, which the master ought to have deducted from the principal of the bond and mortgage for one thousand nine hundred and twenty-six dollars and twenty-nine cents, dated the thirtieth day of October one thousand eight hundred and thirty seven, being five several sums of ten pounds each falsely added to the charges in the day book when posting the entries into the ledger (one of the books of De Mott & Sandford) and forming a part of the consideration of the bond and mortgage ; and that the

second exception stand overruled in every other particular. That the fourth and the fifth and sixth exceptions be allowed, (the two last as consequent on the former;) and that it be referred back to the master to correct his report, by striking off one hundred and twenty-five dollars from the principal of the bond and mortgage of the thirtieth day of October one thousand eight hundred and thirty-seven, reducing it to one thousand eight hundred and one dollars and twenty-nine cents and calculating the interest on that sum as the true amount of such bond and mortgage. And with directions to take proof of the amount of Benson's indebtedness to the complainant, which accrued between the thirtieth day of October one thousand eight hundred and thirty-seven and the first day of July one thousand eight hundred and thirty-nine and which the bond and mortgage of that date were intended to secure over and above making good any deficiency of payment of the two previous bonds and mortgages; and that the master report the amount of such the indebtedness which entered into the consideration of the last mentioned bond and mortgage and the interest due thereon. The defendants to be at liberty to call for the production of the complainant's books and accounts now in question; and to examine the complainant under oath touching the last mentioned indebtedness; and both parties to be at liberty to examine witnesses before the master and to produce other evidence in their possession or power. And the master is to be at liberty to make an amended report conformably to these directions. And further, that the complainant pay to the defendants, Benson and Myers, their costs of the second, fourth, fifth and sixth exceptions and of the hearing on the exceptions, to be taxed.

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DAVIS v. THE AMERICAN LIFE INSURANCE AND TRUST
COMPANY AND ITS TRUSTEES.

D. was induced by the acting officer of a company to buy up 1000 shares of its stock and pledge them to the company, they advancing \$50,000 on his note therefor. The company passed away these shares as on their own account. D. remonstrated; and they gave him up the note, paid him a balance and left an unascertained amount still coming to him in the transaction. Afterwards, the same officer induced D. to let the matter, for conformity, be reinstated upon their books and to give two large notes to cover the transaction, but not by way of indebtedness. Besides this affair, D. and J. had given their joint note for a loan. The company became insolvent; and its trustees brought actions against D. on the two large notes and on the joint note. He filed a bill to restrain the actions and for an injunction: *Held*, that D.'s claim for remaining balance on the 1000 shares was not sufficiently liquidated to allow of an equitable set-off; that the joint note could not, under any circumstances, be the subject of set-off against such individual claim; and that D. had a defence at law. Temporary injunction dissolved.

Oct. 18,
1843.

*Injunction.
Action at
law.
Jurisdiction.*

THE complainant, Charles A. Davis, showed, by his bill, that the American Life Insurance and Trust Company, a corporation created by the legislature of the State of Maryland, had, in the year one thousand eight hundred and thirty-five, an office or agency in the city of New York, under the direction and management of a vice-president and trustees and one assistant secretary. That the complainant became the owner of fifty shares of the stock of the said company and hypothecated them for twenty-five hundred dollars to the company and gave his promissory note for the amount. That the bank of the United States, in Pennsylvania, held two thousand shares of the stock of the said company; and that Mr. John Duer, who then was the vice-president of the said company and at the head of its said agency in the city of New York, proposed to the complainant that, if he would purchase one thousand of such two thousand shares, the said company would lend him the sum of fifty thousand dollars, which would be equal to the nominal or par value of the one thousand shares, upon the promissory note of the complainant, collaterally secured by an hypothecation of the said one thou-

sand shares and which should be subject to the complainant's control and be sold and disposed of at such times as he should direct. That all this took place; and the complainant gave his note for fifty thousand dollars, payable on demand, to John Duer, as vice-president, with interest; and the shares were transferred direct (by the direction of the said Duer) to the said John Duer as vice president of the said company. That about the latter part of the month of November one thousand eight hundred and thirty-eight, the complainant, finding that the stock of the said American Life Insurance and Trust Company had reached, in the market, from twenty to twenty-three per cent. above par, he (then in Philadelphia) wrote to the said vice-president in New York, with directions to sell the said one thousand shares of stock for the account of the complainant. That sum afterwards, on inquiry as to the sale having been effected, he found that the company, through the said John Duer as such vice-president, had sent the said one thousand shares of stock of the complainant's to Messrs. Prescott, Grote, Aimes & Co., the bankers and agents of the said company at London, as a remittance and for sale and so as to credit the proceeds to the company in their account with the said bankers. That all this was done without the knowledge or consent of the complainant; and it was done at a time when the company was indebted to the said Messrs. Prescott, Grote, Aimes & Co. in the sum of seven hundred and fifty thousand dollars and upwards, and for which the latter were urging for payment. That the complainant remonstrated; and insisted that he was entitled to claim and did claim the full market value of the said stock at the times when the same was so remitted; and, also, insisted that the amount of such market value should be credited to the complainant and applied to the payment and discharge of his said note for fifty thousand dollars and that the surplus of the value should be paid over to him. That the said company, by the said John Duer as its vice-president, admitted the justice of all such claim; and did give up such promissory note to the complaint as if paid and cancelled; and, afterwards, paid over to him, in cash, the sum of two thousand and fifty-four dollars and forty-

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seven cents, on account of balance due to him for the value of such shares ; and he claimed an adjustment for remaining balance of value. That the said Duer, still acting as vice-president, afterwards called on the complainant and urged him, with a view that the books of the company might conform, to let the transaction appear as reinstated, by this complainant's giving two promissory notes, one for twenty-six thousand seven hundred and five dollars and fifty-five cents and the other for twenty-six thousand seven hundred and sixty-six dollars and sixty-seven cents ; and which the complainant, in confidence, did. That no property or thing of value was ever given for them ; and the complainant charged that they were not valid securities against him in the hands of the said company or of their assignees. That the said Duer, at the time he applied for them, gave the complainant to understand that the said two notes were not intended to be held as acknowledgment of any existing indebtedness, but merely as vouchers and to serve as mere memoranda of debit in the final settlement of the one thousand shares. Also, that in May one thousand eight hundred and thirty-eight, the complainant and the said John Duer made their joint note to the said company for £2848 14s. depositing, as collateral security, certain stock of the Buffalo and Niagara Falls Railroad Company. That the said company had become insolvent ; and the defendants, George F. Talman and Patrick Macauley, were its trustees. And they had commenced actions against the said complainant on the said two large notes, as well as on his note for two thousand five hundred dollars and, also, on the joint note made by the said complainant and the said John Duer. That the said complainant was advised that, inasmuch as his claim in the premises was founded on a tortious or wrongful conversion of his said one thousand shares of stock and was for unliquidated and unascertained damages, such claim was not admissible at law by way of off-set and he could not avail himself thereof by way of defence there. And he insisted that, inasmuch as there was a balance still due to him on the transaction of the one thousand shares, the amount thereof should go against his joint liability on the note for £2848 14s. given by him and the said John

Duer. *Prayer*, to restrain the actions; and for an injunction accordingly.

A temporary injunction was allowed, except as to the note for two thousand five hundred dollars.

The defendants moved to dissolve it, on bill alone.

Mr. *D. Lord*, for the defendants and in support of the motion.

Mr. *C. O'Connor*, contra.

THE VICE-CHANCELLOR:—I had considerable hesitation about allowing the injunction, in the first instance, from doubts which I then entertained of the necessity of the complainant's coming into this court for relief in respect to the two large notes and as to the bill making out a case sufficient in law or in equity to exempt him from the payment of the other two notes mentioned in the bill and on which distinct suits were brought. The bill calls for no discovery here; and, indeed, the complainant stands in need of none; because the facts, which he has set out, can, doubtless, be proved by the then acting president and secretary of the company—both of whom must have a personal knowledge of the transactions and can be called as witnesses on the trial of the suit at law. But the great point is, whether the facts alleged constitute a good defence at law, either by way of set-off or otherwise; and if not, how far they will avail the complainant as a matter of equitable relief in this court?

The bill proceeds on the ground that the complainant has a just claim for the market value of the 1000 shares of stock or for damages resulting to him from the wrongful conversion of them to the use of the company, which he cannot set off at law against the notes; and that his remedy, in a distinct action for such wrongful conversion or for the value upon an express or implied contract, would be unavailing to him against an insolvent, broken-down, foreign corporation. All this is very true, for I think the demand which the complainant has a right to make, either for the market value or for special damages for the *tort*, in which-

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ever light it may be presented, is not such a demand as can be the subject of set-off under the statute. The amount is not liquidated nor is it capable of being ascertained by calculation within the meaning of those terms as used in the statute: 2 R. S. 354, sec. 18, pl. 3; and see *Holbrook v. Receivers of American Fire Insurance Company*, 6 Paige, 220. But, though a legal right of set-off may not exist, I think the bill presents a case of a perfect and full defence at law against the payment of the two large notes for twenty-six thousand seven hundred and five dollars and fifty-five cents and twenty-six thousand seven hundred and sixty-six dollars and sixty-seven cents, on which one of the suits at law is founded. According to the bill, these notes were given and accepted by the company with no view or purpose of ever calling on the complainant to pay them. The company had already received the money for which they were given and they were, consequently, without consideration. The original indebtedness of \$50,000 had been paid and the note for that amount surrendered and cancelled under an arrangement and settlement of the tenth day of December 1838, and sometime afterwards those two new notes were applied for and given as a mere favor and not as a matter of right to serve the purpose of vouchers in the hands of the officers of the company—not as any evidences of debt which the company could or would ever attempt to enforce, because, by the agreement, the company were still to account for some balance confessedly coming to the complainant from the stock which the company had taken and sold in London, over and above the two thousand and fifty-four dollars which they had paid to him at the time of surrendering the fifty thousand dollar note. Why is not all this a good defence at law in the suit upon these two large notes, not, it is true, by way of set-off or of counter claim, but as showing a total want of consideration, rendering the notes mere blank pieces of paper and no evidence of debt in the hands of the company? I apprehend there cannot be a doubt on the subject; and, if so, the complainant is under no necessity of seeking relief against the notes in this court. In this respect it is not unlike the case of *Minturn v. The Farmers' Loan and Trust Company*, in which the

chancellor recently, on appeal, ordered an injunction dissolved, which had restrained a suit at law on a promissory note, collaterally secured by a pledge of stock and in relation to which the complainant insisted that, in the course of the dealing, he had become exonerated from all personal liability. The chancellor decided that he should be left to make his defence at law. Then, as regards the note payable in sterling money on which a suit is also brought against the complainant and Mr. Duer jointly and enjoined by the present injunction. This note appears to have originated in some other transaction with the company in which Mr. Duer and the complainant were jointly interested, having no connection with and entirely distinct from the business of the one thousand shares of stock and the giving of the original fifty thousand dollar note and the subsequent two notes above mentioned. The bill raises no objection to the validity of this note nor to the liability of the makers upon it for that part of the amount which has not been paid. It only insists that the complainants claim against the company for the proceeds or value of the one thousand shares of stock still remaining to be accounted for and paid to him will go far towards paying off or satisfying this note. As already shown, this cannot be done by way of set-off by reason of the unliquidated character of the demand. And it is, moreover inadmissible as a set-off, because the note is a joint note of the complainant and another person and the suit is against them both. "If there be several defendants," (says the statute) "the demand set off must be due to all of them jointly:" 2 R. S. 354, sec. 18, pl. 6. The bill contains no allegation to show that, as between the complainant and the other joint maker, it belongs to the complainant alone to pay the note so as to take the case out of the strict letter of the statute and enable this court to apply the principle of allowing cross-demands arising from mutual debts or mutual credits in the same right to compensate each other where insolvency or bankruptcy has intervened to prevent a recovery in a cross action. The fact of its being a joint note or a joint bond that is sued upon prevents the application of that equitable doctrine, as is shown by the chancellor in considering one branch of the

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case of *Holbrook v. Receivers of the American Fire Insurance Company*, (see 6 Paige, 231,) and on this same point of extending equitable relief beyond what is allowed by the statute, another difficulty exists in the present case, that the sterling note sued upon and the transaction concerning the one thousand shares of stock have no connection with each other, but were in their origin entirely distinct, growing out of different contracts or dealings, in the one of which a third person was a party who had no interest in the other. This subject is remarked upon by the chancellor in the case cited where he held that Holbrook's individual demand for a loss upon a policy of insurance could not be allowed even in this court to compensate or satisfy a joint bond of his and another person which were held by the receivers of the Insolvent Insurance Company with whom he had effected the insurance, the giving of the bond and the policy of insurance having no connection as parts of the same transaction and it not being pretended that the bond was given for the individual debt of Holbrook with the other person to it as surety only. For the same reasons I think the claim which the complainant has against the company, however just, cannot be allowed either at law or in this court to interfere with the legal right of the company or its assignees to proceed with the suit upon the sterling note.

The suit upon the twenty-five hundred dollar note mentioned in the bill was not enjoined, and hence the present motion does not involve the consideration of any question in relation to it. The injunction, as far as it was granted, must be dissolved, with costs to be taxed.

Order accordingly.

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THE PRESIDENT AND DIRECTORS OF THE MANHATTAN
COMPANY *against* THE PRESIDENT, DIRECTORS AND
COMPANY OF THE GREENWICH BANK, JOHN R. SATTER-
LEE and others.

N. G. C. owed the Manhattan Co.; and on the 15th December, 1836, gave them his bond and a mortgage on real estate. On the 12th March, 1841, they foreclosed, sold and bought in; and there was a deficiency for which (under a transcript of their decree) they issued a *fi. fa.* which was returned *nulla bona*. On the 9th of October, 1838, the said N. G. C. had made a deed of trust, embracing the mortgaged premises, upon trust for the trustee to sell subject to mortgages or free from incumbrances and paying them off out of purchase money and in the meantime collect rents; and after payment of taxes and other ordinary charges, upon trust to pay, first, The Greenwich Bank a specified sum; and, afterwards, certain other creditors. The trustee collected and held rents; and the Manhattan Company now filed their bill, claiming them to make up the balance due them under the foreclosure. *Held*, (on a general demurrer interposed) that the rents which the trustee received were not a trust fund to keep down interest and that they belonged to the Greenwich Bank and should be paid in part of their debt.

BILL of the president and directors of the Manhattan Company (in New York) showed that about the fifteenth day of December, in the year one thousand eight hundred and thirty-five, Nathaniel G. Carnes, to secure the payment to the complainants of eleven thousand one hundred and seventy-five dollars on or before the 15th day of December, one thousand eight hundred and thirty-five, executed to them his bond conditioned for payment of such sum with interest at six and one-half *per cent. per annum*, and a mortgage (in which his wife joined) upon certain two lots of land and buildings at Poughkeepsie, county of Dutchess. That on the first day of May in the year one thousand eight hundred and thirty-seven the complainants released to the said Carnes a part of the said premises. (Description of the lots set forth.) That on the eighth day of May, one thousand eight hundred and thirty-seven, two thousand seven hundred and fifty dollars was paid on account of the principal and a like sum on the twelfth day of July, one thousand eight

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hundred and thirty-eight, leaving due of principal five thousand six hundred and seventy-five dollars, and that large arrears of interest had accrued. And that, being so due, the complainants, on the twelfth day of March, one thousand eight hundred and forty-one, filed their bill of foreclosure and sale; and such proceedings were had that a reference took place to compute the amount due to the complainants on the said bond and mortgage, by whose report, on file, it appeared that the aforesaid balance of five thousand six hundred and seventy-five dollars of principal was due and interest, so that the aggregate amount due was six thousand six hundred and twenty-one dollars and seventy-six cents. That, thereupon, and on the thirty-first day of January, one thousand eight hundred and forty-three, a decree for sale was had and the property was sold thereunder and the complainants became the purchasers at three thousand dollars and, subsequently, they received a deed for the same. That the master who sold the premises had, in his report of sale, set forth that the whole amount due to the complainants for principal and interest upon their bond was six thousand seven hundred and fifty-six dollars and ninety-five cents; that the gross proceeds of sale were three thousand dollars, from which were deducted two hundred and four dollars and seventy-six cents (the taxed costs and expenses of sale) leaving to be applied on the debt of the complainants two thousand seven hundred and ninety-five dollars and twenty-four cents; and that, consequently, there remained, on the twenty-sixth day of May, one thousand eight hundred and forty-two, a deficiency due to the complainants of three thousand nine hundred and sixty-one dollars and seventy-one cents. That, as the complainants were informed and believed, the said report of sale was filed on the thirtieth day of May, one thousand eight hundred and forty-two; and the usual order entered that the same be confirmed within eight days, unless, &c., and that, no cause to the contrary being shown, the same became confirmed. That a copy of the docket of the decree against the said Nathaniel G. Carnes for such deficiency was on the eleventh day of the said month of June filed in the office of the clerk of the city and county of New York (the said Carnes being a resident thereof

at the time) and an execution was duly issued to the sheriff of New York; and which execution was, on the twenty-fifth day of July, one thousand eight hundred and forty-two, returned *nulla bona*. That no part of the deficiency had ever been paid. That the said Nathaniel G. Carnes was insolvent and utterly unable to respond.

That the said Nathaniel G. Carnes and wife, on the ninth day of October, one thousand eight hundred and thirty-eight, by a certain indenture dated that day, conveyed to John R. Satterlee, (a defendant) among other property the premises embraced by the said mortgage (and which conveyance was made after the payment of the said two sums paid on account) and subject, as respected the said mortgaged premises, to the balance due on the complainant's mortgage and another mortgage to Jonathan Goodhue & Co. *Habendum* to the said Satterlee, upon trust that the said John R. Satterlee should sell the premises embraced by the deed and execute deeds, subject to certain mortgages, including the mortgage of the complainants (or, free from incumbrances, paying off the said mortgages from the purchase money); and in the meantime, until such sale, to rent the premises and collect rents; and from the net proceeds of such sales or rents to pay all taxes, assessments, interest, insurance and expenses due and owing and all costs and charges expended in the execution, defence and management of the trust; and then to pay the president, directors and company of the Greenwich Bank the sum of two thousand five hundred dollars; and from the balance of the monies remaining in his hands to pay the several creditors mentioned in a certain schedule to the said deed annexed marked A. Second class, the sums of money set opposite to their names, respectively or so much of all the said debts or sums of money as the said remaining trust monies would pay, being divided among them *pro rata* according to the several amounts of their debts as set opposite their respective names without any preference among them after paying all such costs, charges, incumbrances, monies, expenses and the said sum of money to the said the President, Directors and Company of the Greenwich Bank; and if any monies should be left, after paying the said moneys and performing the trust aforesaid, then to pay

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the same to the said Nathaniel G. Carnes or his personal representatives. That the said John K. Satterlee accepted the said deed and thereby became bound for the faithful performance of its trusts. That the instrument was acknowledged and recorded. The complainants claimed and insisted that the said John R. Satterlee was bound, under the covenants and trusts in the deed, to collect and receive the rents of premises, including those mortgaged to the complainants as aforesaid, until a sale thereof should be effected by him under the provisions of the said deed; and out of such rents to pay, in the first place, all such taxes, assessments, interest, insurance and expenses as might be due or should become due from time to time on the premises until a sale, together with such costs and expenses as he might have been put to in executing the trusts, with the right to retain a reasonable commission before making any payment on account of the claim of the Greenwich Bank or on account of any other debts and claims secured by such deed; and that it was the true intent and meaning of the said instrument and such was the proper construction to be given to the same; that out of the said accruing rents the said Satterlee was to keep down and extinguish the interest as it accrued upon the mortgages then upon the assigned premises, including the mortgage of the complainants and the said Jonathan Goodhue & Co., according to their priority, until a final sale of the property by the said assignee under the terms of the said trust. That, as the complainants were informed and believed, the said John R. Satterlee, from the time of the execution and delivery of the said deed of trust until the sale under the decree in the complainant's suit for a foreclosure, had collected and received rent from the said premises and more than sufficient to pay all taxes, assessments, interest, insurance and expenses due and owing on the said premises at the time of such deed or that had accrued thereon previous to the sale as aforesaid and all costs, charges and expenses for the execution of the trusts and a commission. But, instead of paying and applying the same, as he was directed to do by the said deed, the said Satterlee had applied the same or a large portion thereof towards and on account of the claim of the said the President, Directors and Com-

pany of the Greenwich Bank or towards other claims; and allowed the interest on the said mortgage of the complainants to accumulate and to become largely in arrear, by reason whereof the deficiency on the sale of the mortgaged premises under the said decree for foreclosure and sale was greatly increased. That at the time of the payments to the Greenwich Bank, the said Satterlee was the president thereof. That the said Satterlee had made collections of rents under such trust deed for which he had made no application and rendered no account; and that there was then on deposit in the said Greenwich Bank, of such collections and standing in the name of the said John R. Satterlee as trustee or otherwise, the sum of nine hundred and fifty dollars or thereabouts, which the complainants claimed to be property applicable under the trusts in the said deed as far as the same would extend of the said deficiency. That the whole of such monies so on deposit arose from the said rents; and the complainants charged that the same ought, in equity, to be applied towards the extinguishment of the deficiency aforesaid. That the complainants had repeatedly demanded of the said Satterlee to account. *Prayer:* That the said John R. Satterlee might be decreed to render a full account to the complainants of his said trusteeship and of the monies received under the said trust deed and of the manner of their application; and, on such accounting, might be decreed to pay to the complainants the funds then in his hands as such trustee or such portion thereof as might be applicable to the complainant's said debt and also such monies as he should have paid on account of the said debt under the said deed, which he had neglected or omitted so to do and had paid otherwise, if such were the case; and that he might be restrained by injunction from paying over, &c. And for further relief.

General demurrer interposed.

Mr. *A. W. Bradford*, in support of the demurrer.

Mr. *John Slosson*, for the complainants.

THE VICE-CHANCELLOR:—The question presented by

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the demurrer, upon the construction to be given to the trust of the assignment from Carnes to Satterlee of the ninth day of October, one thousand eight hundred and thirty-eight, under which both parties to this suit claim, is rather a difficult one to determine. The trust, as expressed, is susceptible of a meaning which would give to the complainants all that they claim by their bill; but, I think the true meaning is the one which the demurrer assumes, viz., that the trust was made solely for the benefit of the Greenwich Bank in the first instance, as a preferred creditor; and that the rents which the trustee should receive were not intended to constitute a trust fund applicable, at all events, to the keeping down of the interest on the mortgages and making it the imperative duty of the trustee so to apply it. The assignment was clearly intended to secure the debt of two thousand five hundred dollars to the Greenwich Bank. This appears to have been the leading object of the trust. The application of the rents to the taxes, assessments, interest on the mortgages and insurance, &c., is to be considered only as a power given to the trustee to be exercised according to his discretion for the purpose of preserving the property until he could effect a sale; but if the property should prove to be not worth preserving from a foreclosure and sale, as, it seems, that portion of it on which the complainants held a mortgage was not; then there was no obligation on the part of the trustee so to apply the rents. It does not appear from the bill that the complainants relied upon this provision in the assignment as a trust in their favor and forbore, in consequence, to proceed upon their mortgage or to take measures to intercept the rents upon the ground of an inadequacy of the security. Their remedy was that; and I am of opinion they have no right, now, to resort to this deed of assignment as containing any trust whatever for their benefit.

The demurrer must, consequently, be allowed and the bill be dismissed, with costs.

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DELAPLAINE and another v. HITCHCOCK and others.

Although the liability of a surety is reduced to a judgment against him, yet his rights of subrogation and substitution continue; and the creditor cannot give time to the principal without discharging the surety.^(a)

M. H., by plea, set up that he was, with the knowledge of the complainants, a surety only on the notes of J. W. H. and J. A. M.; that, after judgments against him and them obtained by the complainants on the notes, the latter, by written agreement with the said J. W. H. and J. A. M. and without his (M. H.'s) consent compromised for \$30,000 (including the judgments), giving upwards of four years within which to pay and covenanting not to sue them in the meantime; and also, during such time, receiving \$5,000 in part of the \$30,000. *Held* that the mention of the \$5,000 did not render the plea bad for duplicity; and that such plea was a good plea.

JUDGMENT creditor's bill filed by John F. Delaplaine and Elijah P. Delaplaine against Miles Hitchcock, John W. Hinton and James A. Moore. It was founded on two judgments: one recovered against the said Miles Hitchcock in the superior court of the city of New York for three thousand two hundred and twenty-six dollars and twenty-eight cents and the other obtained in the same court against the said Miles Hitchcock, John W. Hinton and James A. Moore for the sum of two thousand dollars.

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and Surety.*

The defendant Miles Hitchcock interposed the following several plea (after the usual heading and protestation):
" — Doth plead thereto and for plea saith, that the said judgment recovered by the said complainants against this defendant in the superior court of city of New York in the said bill of complaint first mentioned was recovered against this defendant upon a certain promissory note made by this defendant to his own order and by this defendant endorsed in blank, dated, New York November twenty-third one thousand eight hundred and thirty-three, by which this defendant promised to pay, six months after the date thereof, to his own order three thousand dollars for value received, and

^(a) And see *Bangs v. Strong*, 10 Paige's C. R. 11; and S. C. in Error, 7 Hill's R. 250.

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for or upon no other, different or further cause or causes of action whatever, as by the record of the said judgment remaining in the office of the clerk of the said superior court will more fully appear and to which this defendant prays leave to refer. And that the said judgment, so recovered against this defendant and John W. Hinton and James A. Moore in the said superior court of the city of New York, as in the said bill of complaint is set forth, was recovered upon a certain other promissory note, dated New York, January twenty-fourth one thousand eight hundred and thirty-four made by the said Hinton and Moore and endorsed by this defendant, whereby the said Hinton and Moore promised to pay, ninety days after the date thereof, to the order of this defendant, twenty-two hundred and thirty-two \$1-100 dollars value received and for or upon no other, further or different cause or causes of action whatsoever, as by the record of the said last mentioned judgment remaining in the office of the clerk of the said superior court will more fully appear and to which this defendant prays leave to refer. And that the said note for three thousand dollars, first above mentioned, was made and endorsed by this defendant, and the said note last above mentioned was drawn by the said Hinton and Moore and endorsed by this defendant at the request of and for the accommodation of one John A. Moore of the city of New York, merchant, without any value or consideration therefor ever received by or paid, promised or secured to this defendant by the said John A. Moore or any other person or persons therefor; but for the sole purpose of becoming, by means of the said note and the said endorsement, the surety of him the said John A. Moore and the said Hinton and Moore to enable him the said John A. Moore to effect a certain agreement then made or pending between him and the said complainant, whereby they, the said complainants, had agreed or did agree to advance to him the said John A. Moore certain notes or obligations of them the said John F. Delaplaine and Elijah T. Delaplaine on receiving, as collateral security to the obligation or liability of the said John A. Moore therefor, among other things, the said above mentioned promissory notes on which the two judgments were recovered as aforesaid then to be obtained or ob-

tained by the said John A. Moore from this defendant and the said Hinton and Moore as his sureties. And further that, after the making and endorsement of the said two promissory notes, the same were delivered to the said John A. Moore to be used for the purpose aforesaid and were by him, the said John A. Moore, afterwards delivered and negotiated to the said complainants with other notes and securities for their notes or obligations in pursuance of the said agreement so made as aforesaid between them and the said John A. Moore. And further that, as this defendant is informed and believes to be true and charges, at the time of the negotiation and delivery of the said two promissory notes to the said complainants by the said John A. Moore as aforesaid and at and before the time of the recovery of the said two judgments thereof and at and before the nineteenth day of June, 1839, the time of the making of the agreement hereinafter mentioned, the said complainants had notice and well knew that the said two promissory notes were respectively made and endorsed by this defendant for the purpose aforesaid and entirely without any consideration paid, promised or secured to him by the said John A. Moore or any other person or persons, but solely for the accommodation of the said John A. Moore and Hinton and Moore and as the surety of the said John A. Moore as aforesaid. And further that, after the recovery of the said judgments and on or about the nineteenth day of June 1839, as this defendant is informed and verily believes to be true and as appears from the indenture hereinafter mentioned—a counterpart whereof, executed by the said complainants, has been exhibited to and seen by this defendant—the said complainants, by a certain indenture of the date last mentioned made between them and the said John A. Moore, sealed with their seals and with the seal of the said John A. Moore, after reciting, among other things, the recovery of the two judgments aforesaid against this defendant and against this defendant and the said John W. Hinton and James A. Moore, among other judgments against the said John A. Moore and others—and that the said complainants had theretofore commenced a suit in the superior court of the city of New York against the said John A. Moore for a balance of account which was then pending and

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in which it was agreed that the said John A. Moore should, on the execution of the said indenture, give a relicta and cognovit for the whole balance claimed to be due and the said complainant should enter up judgment thereon, did, in consideration of the covenants and agreements thereafter contained on the part of the said John A. Moore and of one dollar to them in hand paid by the said John A. Moore, covenant and agree to and with the said John A. Moore that they the said complainants, their heirs, executors and administrators should and would, at any time or times, on or before the first day of October in the year eighteen hundred and forty-three, receive and accept from the said John A. Moore his heirs, executors or administrators the sum of thirty thousand dollars, which said sum, when paid as aforesaid, should be in full of claims and demands, debts, dues, judgments and recoveries recovered by or belonging to or claimed by the said complainants (so far as the same were unpaid and unsatisfied at the date of the said indenture) against the said John A. Moore, John W. Hinton, James A. Moore and this defendant or any or either of them from the beginning of the world to the day of the date of the said indenture ; and, upon the payment of the said sum of thirty thousand dollars by the said John A. Moore to the said complainants, should and would satisfy and discharge from record, at the costs and expenses of the said John A. Moore, the said several judgments in the said indenture above recited and the judgment to be entered up for the balance claimed to be due, reserving the liability of all other persons except the said John A. Moore, John W. Hinton, James A. Moore and this defendant for the benefit of the said complainants. And that, upon receiving a relicta and cognovit from the said John A. Moore for the sum of one hundred and eighteen thousand three hundred and six dollars and seventy cents the balance claimed to be due on said account with the interest thereon in the said suit therein recited then pending and undetermined in the superior court of the city of New York and upon the execution of the said indenture, they the said complainants should and would surrender and deliver up all and singular the bonds, bills, notes, checks and other evidences of debt (excepting the judgments therein above mentioned se-

verally and respectively and the judgment to be entered upon the said relicta, which it was declared were to be and remain in full force and effect and continue a lien as though the said indenture had not been made until the full performance of the covenants therein contained on the part of the said John A. Moore) of the said John A. Moore, John W. Hinton, James A. Moore and this defendant, excepting thereout such bills or notes or evidences of debt upon which other persons or parties than the lastly above named might be liable to them the said complainants thereon, which liability of said other persons or parties was to be retained by the said complainants without further recourse to the said John W. Hinton, James A. Moore, this defendant and John A. Moore or any or either of them, excepting upon the judgments therein mentioned and the judgment to be entered upon the said relicta and cognovit and then only in the event of the non-performance of the said indenture by the said John A. Moore. And that, in and by the said indenture, the said complainants did, among other things, covenant and agree to and with the said John A. Moore his heirs, executors and administrators that, from the date of the said indenture until the first day of October in the year eighteen hundred and forty-three, they, the said complainants, should not nor would take, institute or move, nor would suffer to be taken, instituted or moved any step, measure or proceeding upon the said judgments therein before recited or the judgment to be entered up thereupon or any or either of them against the said John A. Moore, John W. Hinton, James A. Moore or this defendant or any or either of them for the recovery of the money due thereon or any part thereof or to molest, hinder, trouble, vex or harrass the said John A. Moore, John W. Hinton and James A. Moore and this defendant or any or either of them unless the said John A. Moore should depart this life before the said first day of October 1843, without having duly made payment of the said sum of thirty thousand dollars previously thereto or in case the same should not be subsequently thereto and before the said time paid by his representatives, as by the said indenture will among other things more fully appear, to which indenture when produced and proven this defendant prays leave to

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refer. And this defendant further saith that, as he is informed and verily believes to be true and charges, the relicta and cognovit in the said indenture mentioned was, on the execution of the said indenture, given by the said John A. Moore to the said complainants in pursuance of the terms of the said indenture and that judgment was afterwards, by the said complainants, entered up thereon, and that the judgments against the said John A. Moore in the said indenture recited together with the judgment so entered up on the said relicta and cognovit include all and singular the claims and demands of the said complainants against him the said John A. Moore up to the date of the said indenture and include the demand and claim of the said complainants against him the said John A. Moore for the whole consideration and liability incurred by the said John A. Moore on the agreement hereinbefore mentioned, and on account of which the said two notes, drawn and endorsed by this defendant, were negotiated to the said complainants and that, at the time of the execution of the said indenture, the said John A. Moore was indebted to the said complainants in the whole of the debt for which the two promissory notes aforesaid were negotiated to the said complainants or so much thereof as remained unpaid to the said complainants and that such debt or so much thereof as remained unpaid to the said complainants was included in the judgments against him aforesaid and agreed to be compromised in and by the said indenture; and that such debt was, at the time of the contraction thereof, secured by various bonds, notes and other securities of the said John A. Moore. And this defendant further saith that, as he is informed and verily believes to be true and as appears by a receipt endorsed on the counterpart of the said indenture shown to him, the said John A. Moore, after the execution of the said indenture and on the nineteenth day of June 1839, paid to the said complainants the sum of five thousand dollars on account and in part payment of the said sum of thirty thousand dollars, stipulated to be paid in and by the said indenture. And this defendant further saith, that the said indenture was made and executed and time thereby given to the said John A. Moore without the consent, privity, procurement or knowledge of him the defendant and

that he, the said John A. Moore, is still alive. All which matters and things this defendant doth aver to be true and pleads the same to the whole of the said bill of complaint, &c.

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Mr. *H. S. Dodge*, in support of the plea.

The plea of the defendant Hitchcock is well pleaded and a valid bar to the whole of the complainants' bill.

1. It sets up one single matter of defence to both judgments, viz. that the defendant Hitchcock was the surety without consideration of John A. Moore and known to the complainants so to be as well at the time of the making of the notes as before and at the time of the act complained of; and that the complainants, without his privity or consent, by a valid deed, for a valuable consideration, altered the whole contract with the principal debtor and gave him time for four years. The defendant is thereby discharged: *Gahn v. Niemcewicz's Ex'rs*, 11 Wend. 312; S. C. 3 Paige, 614.

2. The various allegations in the plea all tend to this single defence and do not, therefore, render it multifarious; and if any of the allegations are unnecessary, as they do not set up any other or distinct matter of defence, they are mere surplusage which does not vitiate the plea: Story on Equity Pleading. Although the defence might have been well enough pleaded without setting forth so much of the agreement, yet, as the defendant might have pleaded it *in hæc verba* and must give the whole in evidence if issue be taken on the plea, the only objection on that score would be an exception for impertinence.

3. The surety is discharged wherever the contract is altered and wherever, for any moment of time, the creditor, by a valid agreement, has disabled himself from proceeding against the principal. The reason of the rule has nothing to do with the form of the obligation and applies with equal force after as before a judgment at law against the surety: *King v. Baldwin*, 2 J. C. R. 560.

4. In certain cases, as where in a joint and several bond both obligors appear to be principals and after judgments against the surety and principal, the surety is estopped *in a court of law* from proving himself to be other than a principal. But, these cases depend entirely upon technical

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rules of courts of law and never had any application in courts of equity, which latter never suffer any form of security to affect the substantial equities of the parties; and, accordingly, as well in England as in this state and other states, sureties are constantly relieved in equity where time has been given to the principal, after judgments against both principal and surety and no case and no elementary writer on the law has ever doubted those cases or pretended any distinction between cases before or after judgment against the surety: *Eyre v. Bartross*, 3 Mad. R. 221; *Bank of Ireland v. Beresford*, 6 Dow. 233; *Rees v. Bewington*, 2 Ves. Jr. 543; *Law v. E. I. Company*, 4 Ves. 824; *Nisbet v. Smith*, 2 Bro. C. C. 579; *Rathbone v. Warren*, 10 J. R. 587; *King v. Baldwin*, 17 J. R. 384; *Clark v. Niblo*, 6 Wend. 236, and the Chancellor's opinion at p. 244; *U. S. v. Howell*, 4 Wash. C. C. R. 620; *Jones v. Bullock*, 3 Bibb, 467; 3 Wash. C. C. R. 70; *Waters v. Creagh's Ex'r*. 4 Stewart & Porter, 410; *Wall's Ex'rs. v. Gresson's Distributees*, 4 Munf. 110; *Tinsley v. Oliver's Adm'rs*. 5 Munf. 419; *Alcock v. Hill*, 4 Leigh, 622; *Lusk v. Ramsay*, 3 Munf. 417; *Fryer v. Austill*, 2 Stewart, 119; *Perkins v. Kershaw*, 1 Hill C. R. 351.

5. There is no decision of any court of equity nor even any dictum on the other side. The case of *Lenox v. Prout*, 3 Wheat. and the case of *Bay v. Tallmadge*, 5 J. C. R. (which cites or rather miscites the first case,) are, both of them, dicta wholly unnecessary to the decision of the causes which are both decided on the facts against the surety and are opposed to the whole current of authority. But they do not, either of them, apply or pretend to apply to any other case than the case of a surety complaining of negligence or delay in the creditor after the judgment and they are put on the ground that the surety might pay the debt and take an assignment of the judgment against the principal. A reason that fails wholly in a case like the present when the complaint is that the creditor has disabled himself from assigning the judgment. Chancellor Kent's meaning appears very plainly from a comparison of *King v. Baldwin*, in 2 J. C. R. 560, (which was reversed in 17 J. R. *ubi supra*)

and *Berg v. Radcliff*, 6 J. C. R. at p. 307, with the case of *Bay v. Tallmadge*.

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Mr. *M. Hoffman*, for the complainants.

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THE VICE-CHANCELLOR :—The plea is sufficiently unobjectionable in point of form ; and the several matters set out in the plea all tend to one point, namely, the making of an agreement by which the complainants gave time to the principal debtor, without the consent of the defendant, a surety. And in order to show that it was a valid agreement and available against the complainants, the plea alleges a part performance or agreement in part executed by payment and acceptance of five thousand dollars on account of the stipulated compromise. This allegation does not, in my opinion, render the plea bad for duplicity.

The question, then, arises, whether the plea contains matter in bar of the relief and, of course, of the discovery as incidental to that relief ? In order to test the goodness of this plea, it is necessary to consider in what position the parties stood towards each other at the time of making the agreement and entering into the covenant set up in the plea. Did Hitchcock, then, stand in the light of a mere surety, as when his liability rested upon his endorsement of the notes or had he become a principal debtor and lost the character of surety or of being a mere accommodation endorser by suffering the demands to pass into judgments against him ? The complainants contend that the original liability having merged in the judgments, the relation of principal and surety thereby ceased and the complainants were no longer bound to regard him as a surety, but were entitled to treat him as a principal debtor. It is very true, that the recovery of a judgment against the endorser of a note or bill or against bail has the effect of converting a suretyship into an absolute indebtedness and to make him, who was only contingently liable before, now actually a debtor, so that the creditor party may proceed, at once, to compel payment from him, without waiting to exhaust his remedy against the person or property of the one who was principally liable for the same debt or demand. If he has

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judgment at the same time against the one who was originally the principal debtor and has the power to pursue him with an execution, still, the court of law will not, nor will this court, as a matter of equity, compel him to that course, but will leave him to enforce payment from that quarter where he can obtain it most easily and speedily. This is about the extent and meaning of the cases of *Lenox v. Prout*, 3 Wheat. R. 520; *Findlay's Executors v. Bank of the United States*, 2 M'Lean's Rep. 44; *Bay v. Tallmadge*, 5 J. C. R. 305; and of other cases cited on the argument.

All that the courts can do in such cases is to help the man who, thus, has been compelled to pay the debt of a third person, to all the rights and remedies and to the benefit of all the securities which the creditor may happen to hold or be possessed of or be entitled to against such third person. This is done on the principle of substitution or subrogation. The party paying the debt is entitled to take the place of the original creditor, to have an assignment of any judgment and execution against the primary debtor and a transfer of any collateral securities the creditor may hold. All this he is entitled to when he pays the debt. No matter whether before or after a judgment against him. His character of surety is not to be lost sight of from the mere fact that his liability has undergone a change and become merged in a judgment. I am entirely at a loss to perceive how that circumstance can make any difference in regard to this equitable doctrine of substitution. No case has or can be produced where it has been decided that he has lost the right to be regarded and treated as a surety because he happens not to pay the debt until after a judgment has been recovered against him. Whenever he does pay, either voluntarily or by compulsion, he becomes the creditor and is entitled, of course, to sue at once for his reimbursement. This is a right which cannot be denied or withheld from him. And it is equally clear that, superadded to this right of action, is that of subrogation as between him and the original creditor. Under these circumstances, the original creditor can do no act, in the meantime, without his consent, which should have the effect of suspending his right of action or

of lessening his chance of reimbursement, except at the peril of discharging him from all liability.

Now, what have the complainants done in this case? According to the plea, they entered into an agreement with John A. Moore, the principal debtor, to accept a compromise of thirty thousand dollars in full of all his indebtedness to them, including the amount of the judgments against Hitchcock as the mere surety or accommodation endorser of Moore's note, giving time to the extent of upwards of four years within which to make the payments and covenanting not to sue or take any legal measures or proceedings whatever during that time. This was a valid and binding covenant of which Moore could, at any time, have availed himself. It was entered into without Hitchcock's knowledge or consent. The effect of the agreement and covenant was, at least, to suspend all right of action against Moore, the principal debtor, from the nineteenth day of June one thousand eight hundred and thirty-nine to the first day of October one thousand eight hundred and forty-three; so that, if Hitchcock had been disposed and had wished, during that period of time, to have cleared himself by paying off the judgments against him, he could have had no remedy over against Moore, except in violation of the complainants covenant. They had no right to place such an obstacle or impediment in the way of his choice to have the matter brought to a speedy close and thus to postpone his right of substitution and subrogation for that period or for any length of time without his consent. Perhaps Hitchcock may not have been injured by this delay or forbearance; still, that is not the question. The point is, have not the complainants done an act calculated to injure him or to increase his risk and to vary the terms and obligations of his contract? Chief Justice Savage has stated the true principle, as collected from various cases, in *Brown v. Williams*, 4 Wend. 360. "If the creditor," he observes, "by agreement with the principal debtor, without the surety's consent, has disabled himself from suing when he would otherwise be entitled to sue under the original contract or has deprived the surety, on his paying the debt, from having an immediate

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recourse to his principal, the contract is varied to his prejudice and he is, consequently, discharged."

I cannot but think that this principle applies, in all its force, to the present case. I must allow the plea.

STONEY and another, Executors, &c. v. THE AMERICAN
LIFE INSURANCE AND TRUST COMPANY and others.

Where an injunction is issued to restrain a foreign banking company from proceeding to foreclose a mortgage given as security for their certificates and there is a serious question as to the transaction not being within the spirit of the restraining act against unauthorized banking and the circulation of certain notes or evidence of debt issued by banks, (1 R. S. 712) the court will not dissolve the injunction on the coming in of the answer. (The court, however, in this case allowed a cross-bill to be filed by the company to sell the property embraced by the mortgage, inasmuch as the same might, otherwise, have been sacrificed.)

A foreign institution, on an application in New York to loan \$100,000 at seven per cent. on bond and mortgage of property there, agreed to give their certificates to that amount bearing interest at five per cent. and a large portion of them payable in twenty years: such a transaction, *it would seem*, is usurious.

Nov. 14,
and 16,
1843.

Practice.
Injunction.
Restraining
act.
Usury.
Corporation.
Foreign
Corporation.

MOTION to dissolve injunction on bill, answer and further answer.

The facts will be sufficiently found in the opinion of the court.

Mr. William Betts and Mr. Benjamin F. Butler, for the motion.

Mr. D. P. Hall and Mr. D. D. Field, in opposition.

THE VICE-CHANCELLOR:—We have here a motion, on the part of the American Life Insurance and Trust Company, to dissolve the injunction which at present exists to prevent the foreclosure of fifty-nine lots of land near Tompkins Square in the city of New York.

The facts appear to be these: Nicholas B. Stuyvesant, of

Feb. 27,
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the firm of Dudley & Stuyvesant, executed a mortgage to John Stoney for one hundred thousand dollars on fifty-nine lots of ground to secure him for advances to the firm. He, relying upon the integrity of those gentlemen, did not take the precaution to put the mortgage on record. Afterwards, a mortgage was given by Dudley & Stuyvesant to Mr. Wilder for seventy-five thousand dollars on the same premises, and he, immediately, put it on record; and, finally, a third mortgage was given by them on the lots to Thomas E. Davis for twenty-five thousand dollars, which was also put on record—and before Mr. Stoney awoke to his danger the latter two mortgages were put in suit and foreclosure. The mortgagors set up a plea of usury on Wilder's bill, and Stoney was made a witness. It was supposed the parties would go on and make good their defence, so that Stoney would have precedence, but the defence was withdrawn and a decree was taken almost by default, by which Stoney lost the opportunity which had been promised. Under that decree, the property was sold and Thomas E. Davis became the purchaser for one hundred thousand dollars. The result would have been, if the sale had been made good, to cut out all claim of Mr. Stoney. The property, however, at that time (which was in 1838) was subject to the redemption law; and of that right they could not deprive Mr. Stoney. In consequence of that, some arrangement was made, by which, if any thing could be made, over the two mortgages, Stoney was to have had the benefit of it, as the property was supposed to be worth much more than one hundred thousand dollars. Accordingly, an arrangement was made between Wilder and Davis and the assignees of Dudley and Stuyvesant, by which Mr. Stoney might have such benefit, by paying off the prior incumbrances (that is, the two mortgages); and Mr. Davis became the agent to negotiate a loan and satisfy the mortgages.

He applied to the American Life Insurance and Trust Company for a loan, not of money, but of their certificates of deposit for one hundred thousand dollars on the security of the property; and the company loaned its certificates to that amount—some payable in one year, but others (a large amount) payable in twenty years and bearing an interest of

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five per cent. It is alleged in the bill that these certificates of deposit were depreciated and could not be sold at any thing like their par value; and that they were issued for the purpose of enabling Davis to pay off his own and Wilder's mortgages. The twenty year certificates were drawn in sterling money and sold in London at a loss of fifteen per cent—and those for one year sold here at a loss, but less in amount.

The question is, whether the American Life Insurance and Trust Company, being a foreign institution chartered in Maryland, did not bring themselves by this transaction within the provisions of the restraining law?

These certificates professed to be based upon actual deposits of money made with the company. The company was in the habit of receiving deposits and allowing five per cent. on them. I think a serious question arises, whether the issuing such certificates was not a violation of the statute? The certificates formed a piece of machinery, probably got up for the purpose, and contained a falsehood on their face, in saying there had been a deposit. But, if parties enter into a negotiation to take the certificates at their word and say they are evidences of deposit, is the company not bound to admit that they were engaged in such business, such company at the time being a foreign corporation and the loan and mortgage made in this city? The bill says, that their doing so was contrary to law. The bill does not say, it is true, that they opened an office in this city to do business as a bank—still, there is a question, whether the company have not brought themselves within the statute prohibiting transactions of that kind?

It is hardly necessary to take up time to speak of the provisions of the restraining law. The law, as enacted by the revised statutes, 1 vol. 712, has been modified by the act of 4th February, 1837, (Session's Laws of 1837, ch. 20, p. 14,) so far as to take off the prohibition from individuals, but then there is a saving clause that it shall not be construed to allow a corporation of another state or country to keep any office to receive deposits or discount or put evidences of debt into circulation as money. A good deal has been said as to what will constitute such an office; and the question

admits of much nice criticism. I do not intend to go into a definite opinion on the point. I consider it only necessary to show that the present case might, possibly, come within the provisions of this statute and that it is deserving of grave and serious consideration, whether the transactions of this company, by way of loan, based on deposits, are not prohibited by law and, therefore, void as to any person who has had such transactions with them? Cases in point are in the 17th and 25th Wendell on the subject of these restraining acts: *De Groot v. Van Duzer*, 17 Wend. 173; *New Hope Delaware Bridge Company v. Poughkeepsie Silk Co.*, 20 Wend. 648. In that of the *New Hope Delaware Bridge Company* it was held that a foreign corporation, having an office in this state, could not maintain an action here for money lent.

The bill shows that this company was engaged in business in New York; and whether this is a sufficient allegation or not is a question. All that I wish to say, at present, on this branch of the subject, is, that it presents a question whether the company are not within the statute; and, if so, whether, it becomes expedient to dissolve the injunction?

It is contended, that this transaction of issuing and receiving a bond and mortgage of the same amount as the certificates—the first at seven and the other at five per cent. and depreciated, and which certificates were issued to raise money and a loss accrued in doing so of fifteen per cent.—is not a case of usury so as to avoid the contract.

There was a case decided in October last by the Assistant Vice-Chancellor of the eighth circuit in which this company were parties. It was on a bill filed by a judgment creditor of a person named Harrington to displace the mortgage so that his judgment could be operative against the premises. The ground taken was usury. It was a case in which the company had been applied to for a loan of money. They said, they had no money, but they would issue certificates of deposit and loan them, and the borrower Harrington was referred to a broker who might be prevailed upon to come to the office and deposit a large amount such as the applicant wanted and, on that, the Company would issue. He applied to the brokers and they consented and deposited twenty-five

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thousand dollars or fifty thousand dollars. The broker was willing to go and deposit for twenty years or five years and receive certificates at five per cent. The certificates were actually handed to the borrower, who gave his bond and mortgage at seven per cent. The Assistant Vice-Chancellor went fully into the case to show how it took place. He came to the conclusion that the transaction was usurious, as there was no application of money but, instead of that, certificates of deposit at five per cent., for which the borrower gave bond for seven per cent., and was not only subject to the loss of two per cent. but to a depreciation of fifteen per cent. on the certificates besides. These he considered sufficient to support the charge of gross usury.

In the recent case of *The Farmer's Loan Company*, I came to the conclusion that there was no usury, because it was simply an exchange of notes. Mr. Minturn gave his note to the company and received bonds for a like amount, both maturing at the same time, the one drawing five and the other seven per cent. interest and being a mere exchange of paper with a difference of only two per cent. I did not consider it usurious. But, where the certificates are issued for twenty years at five per cent. interest in exchange for securities of one year at seven per cent., the company obtains a vast advantage. They have the money to use nineteen years, while they are paying only five per cent.

I apprehend, in this case, if the complainants are in a situation to take advantage of usury, it presents a case where it may be important to consider whether the whole transaction is not affected? The question is to be considered before the subject is disposed of and the property subjected to a sale under the power contained in the mortgage, which I think it ought not to be. Could the complainant, then, take advantage of usury? The answer is put on the simple footing that Mr. Stoney was the purchaser of fifty-nine lots and received the certificates for one hundred thousand dollars, and executed the mortgage for the purchase money; that it was a transaction between Stoney and Davis and there was no connection with nor had it relation to the mortgage or these certificates. If that could be sustained, all danger as to the security might be done away. The title to

this property stood in the name of Messrs. Duer and Robinson, as trustees of the company after the certificates were issued to Davis, who became the purchaser of the property and applied for the loan; the deed was executed by a master in chancery, under Davis's purchase, as security for the loan. He gave his bond for ninety-five thousand dollars. So, the company held a deed in the name of Messrs. Duer & Robinson and also held Davis's bond, the deed being security for the bond. It so stood from one thousand eight hundred and thirty-eight to one thousand eight hundred and forty. Mr. Stoney having died and his executors living in Charleston, they come here to look after their property, and find it thus disposed of and that they could step in and pay off the amount obtained. The company, in their answer, deny that Mr. Davis was their agent; and say, they did know him but as an individual. They say, the executors wished the benefit of the arrangement of the year one thousand eight hundred and thirty-eight and asked the company to give up the property to them on executing the bond.

It does seem to me that the charge of usury attaches to the transaction; but I am not called upon, now, to give an opinion on that point.

It is contended by the bill that, as the American Life and Trust Company was unauthorized to do business in this state, the transaction is void as relates to the bond and mortgage in question; and that the company cannot give title. On the other hand it is said they are unconnected with the mortgage which was given to Messrs. Duer & Robinson, and, by them, passed to the company. I cannot consider, however, but that they are connected. Mr. Stoney having died at Charleston, his executors, the defendants, came on in relation to it. As the case stands, I am of opinion it would not be proper to remove the injunction and authorize a sale, for, as there are doubts in relation to the title, the property would probably be sacrificed. The defendants ought to have the liberty, however, to file a bill now, so that, when the question is settled, a sale may take place, if necessary, free from all possible difficulty.

Motion to dissolve injunction denied, but the defendants

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are to be at liberty to file a cross bill for the purpose of a sale and foreclosure of the mortgaged premises.

IN THE MATTER OF THE PETITION OF ANTHONY H.
RYDER, AN INFANT, &C.

A widow who has a life estate in property devised to her, (while her husband is alive,) cannot be compelled by this court to break into it or to apply the same towards the support of an infant child who will be entitled in remainder. Nor will the court order it out of such, his future estate.

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*Tenant for
life.
Parent
and child.
Infant.
Maintenance and
support.*

MARGARET HAFF, by will, gave a life estate in all her real and personal property unto her daughter Sarah Ann, the then wife of William J. Ryder, the same to be for her own use and benefit, exclusive of her then present or any future husband; and, after her decease, the real and personal property itself was to go to her children absolutely. The estate was protected by a trustee.

The husband of this Sarah Ann, namely, William J. Ryder, died; and she married Daniel Richards. Among her children, at the time of such second marriage, was Anthony H. Ryder, an infant, over the age of fourteen years. He now presented a petition, by his next friend, setting forth the will of his grand-mother, Margaret Haff; the death of his father; his mother's second marriage; difficulties between him and his mother and step-father; that he had left their roof in consequence; and that, although her life estate netted about two thousand dollars a year and he had entered a lawyer's office as a student and required a reasonable support, yet, his mother had entirely neglected him of late. And he insisted, in his petition, that she was bound, by the law of the land, to maintain and support him decently and to educate him in a manner suitable to her condition in life and means, more especially as

she was made the recipient of the income of the estate bequeathed as aforesaid and which, from the terms of Mrs. Haff's will, he submitted it was fairly to be inferred the testatrix intended her daughter (his mother) should apply in part to the support of her infant children. *Prayer*: That the trustee of the estate pay to the petitioner, from time to time, such sums as should be convenient and necessary for his support, &c. or that such sums should be allowed to him out of his estate in remainder.

This petition was met by affidavit of the mother and her husband showing unkind and ungovernable conduct on the son's part.

Mr. J. M. Martin, for the petitioner.

Mr. J. Dickman, contra.

THE VICE-CHANCELLOR :—Parents are bound to support their offspring during infancy. It is both a legal and a moral obligation which rests upon the mother as well as the father, when she happens to become the surviving parent and no other provision is made for the children.

If the children have an estate independent of the parent, whether it be father or mother, the court of chancery may and often does make an allowance out of their own estate for their support, in order to relieve the parent from the burden, especially when such parent is in moderate circumstances or unable to afford a suitable support. But here the petitioner and the other children of Mrs. Richards, late Mrs. Ryder, have no estate out of which a present support can be ordered, without the consent of the mother. Their estate is one in remainder merely with no immediate benefit or income to them. The mother has the use and income during her life as her own, to dispose of as she may please, without any trust or accountability for such income to any of her children. When the will was made and when it took effect, the father of the children was alive and the testatrix may have supposed that he would be able to do his duty towards them and, hence, did not provide that the property left by her to their mother for her separate estate

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should be devoted, during her life time, to their support. The testatrix doubtless believed it would be so applied if it became necessary ; but this she was willing to leave to that mother's discretion, as a matter of maternal feeling which the court of chancery can have no jurisdiction over or right to control. None of the cases cited by the petitioner have gone this length.

If the mother, Mrs. Richards, should become desirous of having the capital of this estate broken in upon for the purpose of giving a necessary support to her children, her application might be granted within the principle of the *Bostwick Case*, 4 J. C. R. 100, and the class of cases there referred to. But, as the breaking in upon the capital would be to diminish her income, it cannot be done without her consent.

Neither can the alternative prayer of the petition be acted upon.

As to the legal liability resting on the matter at common law and by statute 1 R. S. 614, it is sufficient to say that the remedy to enforce it must be pursued in another court.

Order, dismissing the petition, with costs to be taxed and to be paid by the next friend.

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v.
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DICKINSON, Junior and Wife v. CODWISE and another.

Where a master finds in favor of a plea of former suit pending and the complainant is dissatisfied, his course is to except to the report and, in this way, bring the matter before the court.

Where the matter of a second (former suit going on) is incidental to the matter of the first, although not embracing so much, a plea of former suit pending will hold. The complainants in the first suit should amend or put in the incidental matter in a supplemental bill.

THE master had reported in favor of a plea of another suit pending. The complainants excepted; and the points were, as to the regularity of the course (by excepting) taken by them—and as to the direct point taken by the plea.

Mr. S. F. Clarkson, for the complainants and in support of the exceptions.

Mr. E. H. Owen, contra.

Jan. 8.
1844.

*Pleading.
Plea of
former
suit pending.
Practice.
Exception.*

THE VICE-CHANCELLOR:—This cause must be considered as regularly before the court on the exception to the master's report: 1 Newland's Ch. Prac. 163.

Aug. 13.

The question is one of fact: whether the bill in this case is for the same cause as the former bill still pending in this court?

The first bill is filed for an account from the defendant Mary Codwise and for a partition of the real estate; and making all the children and their representatives defendants. The present bill is for an account of the real and personal estate, with some collateral matters, such as following the house No. 17 Waverley Place, New York, and bringing it in as a part of the estate and to set aside the trust deed from Mrs. Codwise to John C. Van Rensselaer, as being a fraud on the rights of the complainants and the other children. But, the present bill does not ask for a partition—nor does it bring the necessary parties for that purpose before the court. It is only brought against Mrs.

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Codwise and her son-in-law, Van Rensselaer, as accounting parties. Now, although partition is not an object of this bill, yet, accounting is ; and an accounting is one of the objects and one of the causes of the first bill. The cause for filing this bill is the same as that embraced by the first bill. True, there are some collateral and additional matters here ; but those might be introduced into the first bill ; and, instead of filing a second original bill for the purpose of bringing those matters before the court, the complainants should have amended their first bill or have filed a supplemental one. It seems to me not necessary or proper to be going on with two suits *pari passu*, when one is capable of accomplishing the whole object. The additional matter in the present bill, about the Waverley Place house and the trust deed, is but incidental to the matter of accounting ; and, so far as this bill goes, leaves it to be a bill for the same cause as is contained in the bill first filed.

I consider the master's report to be well founded ; and the exception to it must be overruled, with costs to be paid by the complainants.

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BROWN v. BROWN.

Equity can control foreign executors and administrators where failure of justice or a hopeless remedy might otherwise occur, but it will not ordinarily sustain suits against them (where they have not taken out letters in this state.)

Bill for an account and to secure assets was filed by a residuary devisee and legatee residing within the jurisdiction against executors casually here but whose residence was in another state, where the will had been only proved and the testator had died. Although the principal part of the property was in that other state, there was some within New York; yet there were no special circumstances in the case. Demurrer interposed; and allowed.

BILL filed by Nicholas Brown of Piermont, Rockland County, State of New York. It set forth the will (and codicils thereto) of Nicholas Brown, senior, late of Providence in the State of Rhode Island, under which the complainant was entitled as a residuary devisee; and also showed that such will, with the codicils, was proved before the municipal court being a court of probate of the city of Providence in the State of Rhode Island. Likewise, that John Carter Brown, Moses B. Ives and Robert H. Ives accepted the trusts as executors and letters testamentary were, by the said municipal court, issued to them. That, at the time of the decease of the testator, his heirs at law and next of kin were the complainant, who was his eldest son, the said John Carter Brown who was his youngest son, and his two grandchildren Abby Brown Francis and John Brown Francis of Warwick in the said State of Rhode Island. That no letters testamentary or of administration had been issued to any person upon the estate of the said Nicholas Brown senior in the State of New York. Allegation that there was property, real and personal, to a large amount, and that a considerable sum was invested with the New York Life Insurance and Trust Company and in the Bank of the State of New York and New York Insurance Company; and the complainant believed that if the said executors disposed of such investments, the amounts thereof would be removed out of

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1844.

*Jurisdiction.
Pleading.
Bill.
Executor
and administrator.
Foreign
Executor.*

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the jurisdiction of the court. That they were all citizens and residents of the State of Rhode Island ; and that they and each of them were but seldom in the State of New York and when they and each of them did come, they remained but for a day or two and immediately departed therefrom—and the complainant believed that if the said executors were suffered to depart from the State of New York the complainant would be wholly remediless.

Prayer against these executors for an account generally or so far as the assets in New York were concerned ; and that, after payment of all legal charges, the clear balance might be secured by and under the order of this court for the benefit of the complainant and the other residuary legatees and devisees under the said will—or, for further or other relief. Prayer, also, for an injunction.

The defendants demurred generally, and, then, “for a further cause of demurrer these defendants severally show that, as it respects the personal property of the said Nicholas Brown, senior, in the said bill named, which is in the same bill alleged to have been in the State of New York at the time of the death of the said Nicholas Brown, they, these defendants, if answerable or bound to account concerning the same to any person, can only be required to answer or account for the same unto an executor or executors of the last will and testament of the said Nicholas Brown, senior, deceased, to whom letters testamentary have been issued by some competent authority under the laws of the State of New York or under an administrator or administrators of the goods, chattels and credits of the said Nicholas Brown, senior, deceased, duly appointed under the same laws ; and that, as it respects all the residue of the real and personal estates of the said Nicholas Brown, senior, it is not alleged in the said bill that the same or any part thereof or any proceeds thereof were within the State of New York at the time of the death of the said Nicholas Brown, senior, or at any time since ; and, therefore, the proper courts of the said State of Rhode Island in the said bill named, where such residue of the real and personal estates lie and where these defendants reside, as appears by the said bill, have competent and exclusive jurisdiction to require these defendants to answer

and account concerning the same. And these defendants are severally advised that this court has not, as it appears by the said bill, any jurisdiction to enable it to require these defendants to answer or account concerning the same or any part thereof. And for a further cause of demurrer to the said bill, these defendants severally show, that the said bill does not allege against these defendants or any of them any fraud, breach of trust or misapplication, contrary to their duty as executors, of any part of the real or personal estates in the said bill mentioned.

"And for a further cause of demurrer to the said bill, these defendants severally show, that it appears by the said bill that the same is filed before the vice-chancellor of the first circuit of the state of New York, who hath not jurisdiction of the same: because it appears by the said bill that the cause or matter of the said bill did not arise within the said first circuit and that the subject-matter in controversy, in the said bill mentioned, is not situated within the said first circuit; and that the defendants did not nor did any of them reside within the said first circuit at the time of filing the said bill. Wherefore, &c."

Mr. *O'Connor*, in support of the demurrer.

Mr. *Tucker* and Mr. *Crapo*, for the complainants.

THE VICE-CHANCELLOR:—If the court of chancery has jurisdiction at all of this bill, it may be exercised by the vice-chancellor of the first circuit: some portion of the property in question being situated within the circuit.

But the principal ground of the demurrer is, that the defendants, being foreign executors, are not liable to be sued or called to an account in the courts of law or equity of this state.

The will was made in Rhode Island, where the testator resided, where the bulk of his estate is situated, where the will has been proved and letters testamentary granted, and where the executors reside. Some funds of the testator had been invested by him in stocks in the city of New York; and remained so invested as well at the period of his death

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as at the time of the filing of this bill. The complainant, a resident of New York, is one of the residuary devisees of the estate ; and he files this bill for the purpose of calling the defendants to an account in relation to the whole estate and of having his residuary share ascertained and secured or paid to him and of preventing, in the meantime, the funds invested here from being transferred or removed out of this jurisdiction.

The defendants have not qualified as executors under the laws of this state, not having proved the will or taken out any letters of administration here. As a general rule, suits cannot be brought by or against foreign executors or administrators : that is, they cannot sue or be sued as such by virtue of an appointment or authority derived from the laws of another state : Story's Con. of Laws, § 515.

It is true, that, previous to our revised statutes, an executor or administrator coming from abroad into this state and here collecting property or money of the decedent, without first taking out letters under the laws of the state, might be sued as an executor *de son tort* ; and such was the case of *Campbell v. Tousey*, 7 Cow. 64. But the revised statutes have abolished this remedy by action against any person as executor in his own wrong, (2 R. S. 449, § 17,) and made ample provision for a legally constituted executor or administrator, (lb. 75, § 31,) so that a suit similar to that of *Campbell v. Tousey* could not now be sustained at law.

True, also, there are cases in which the court of chancery will assume jurisdiction over foreign executors and administrators at the instance of creditors, legatees or next of kin ; still, these must be special cases and where, but for the interference of this court, there would be manifestly a failure of justice or only a hopeless remedy elsewhere. Instances are pointed out by the chancellor in *McNamara v. Dwyer*, 7 Paige's C. R. 239 and in which case he deemed himself called upon to assume jurisdiction over a foreign administrator who had left his own country and come here, bringing with him the property of which he was administrator and was engaged in wrongfully applying it to his own use.

The bill in question does not present such a case, nor at-

tempt to show that the complainant cannot have an adequate remedy in the courts of the State of Rhode Island. This complainant is not a creditor seeking payment of a debt contracted with him in the State of New York and upon the faith of funds or property placed within this jurisdiction and which it might be unjust to withdraw from his reach. He is a volunteer claiming the gift of a residue of a large estate under a will made in the State of Rhode Island, where the bulk of the property is situated and where the persons entrusted by the testator with its management reside and where the testator, doubtless, contemplated that the affairs of his estate should be closed and settled. The will was made with reference to the laws of the testator's domicile ; and by those laws are the affairs of his estate to be administered, the accounts settled and the residue ascertained and distributed. The complainant, in taking his share, must be left, at all events, to the operation of the *lex loci* of the testator's domicile in regard to his rights ; and in my opinion he must also be left to pursue his remedy according to the *lex fori* of Rhode Island, unless, indeed, he could show, which he has not done, that by some act of the defendants, in removing their persons or the property from that jurisdiction, any remedy, which he might undertake to pursue there, would be fruitless.

The demurrer must be allowed ; and the bill dismissed, with costs.

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No necessity, in answering a judgment creditor's bill, to discover as to property coming to defendant up to filing the answer. All a complainant can do is to require a discovery (up to that late time) of the mere *condition* of the property which the defendant had when the bill was filed. Where an answer shows property acquired after bill filed, a supplemental bill is necessary to reach it and the particulars of it. Where a right to property comes to a judgment debtor before bill filed, but administration to it takes place afterwards, the same may be reached by a supplemental bill making the administrator a party; although it might be that a complainant, knowing of the right, could have amended and compelled an assignment of it to a receiver.

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1844.
Pleading.
Exception.
Answer.
Practice.
Supple-
mental
Bill.

EXCEPTIONS to a master's report, allowing exceptions to the defendant's answer—put in to a judgment creditor's bill. Judgment recovered on the eighth day of January one thousand eight hundred and forty; *fi. fa.* issued the sixteenth and returnable on the eighteenth day of the same January; returned *nulla bona*; and filed the twentieth day of February following. The bill was filed on the twenty-third day of March one thousand eight hundred and forty, in the usual form; and with all the common allegations of a judgment creditor's bill in regard to property—claiming an answer in relation to the same “as well at the time of filing the bill as until and at the time of filing his answer.”

The defendant answered that on the twenty-eighth day of February one thousand eight hundred and forty, he did duly and according to law assign and deliver to Thomas F. Richards all his property of every nature and description, to be held and disposed of by the assignee for the payment and satisfaction of the several debts due and owing by the defendant to his several creditors *pro rata*; and further, that he had not, at the time of filing the bill, any equitable interests, things in action or other property of the value of one hundred dollars and more exclusive of all prior just claims thereon; nor any amount of money, &c. [going on, following the language of the bill,] “except what may re-

vert to this defendant after the full payment and satisfaction of all claims and demands against this defendant in virtue of the said assignment."

Exceptions were taken for insufficiency, mainly on the ground that while the defendant showed he had made an assignment for creditors, yet, it did not appear that the complainant's debt was provided for; and, also, that the defendant should have answered as to property up to the filing of his answer. The exceptions were allowed by the master.

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Mr. *Brinckerhoff*, in support of the exception taken to the master's report.

Mr. *Sears*, contra.

THE VICE-CHANCELLOR:—The exceptions appear to be taken and allowed because the defendant has not set forth, particularly, the property assigned and wherein he has a reversionary interest. But this cannot be material to the complainant to know in this suit: because their debt must be paid before any reversionary interest or property can come to the defendant.

Aug. 13.

He was not bound to answer as to any property acquired between the filing of the bill and the putting in of the answer. The call in the bill, in that respect, is understood as applying to property which the defendant had at the time of filing the bill and on which it became a lien and the present condition of which he should disclose as well as the past. A supplemental bill is necessary to discover as well as to reach property acquired by a defendant subsequently to the filing of the original bill.

I am of opinion that all the exceptions to the defendant's answer should have been disallowed.

Order that the exception of the defendant to the master's report be allowed, with costs to be taxed and credited on the judgment.

This case came up again on demurrer to a supplemental bill. The defendant was entitled to a share in the property

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of his mother, who had died intestate. This share fell to him prior to the filing of the original bill; but her administrator, Mr. John L. Lawrence, was not appointed until afterwards. The question was on a point of pleading: whether the complainant should not have amended and, in that way, have avoided the filing of a supplemental bill.

Mr. Brinckerhoff, in support of the demurrer.

Mr. Sears, contra.

June 9,
1846.

THE VICE-CHANCELLOR:—The ground on which this demurrer is taken is that the matter of substance introduced by way of supplement might have been introduced into the original bill by way of amendment; and, hence, that a supplemental bill is unnecessary. It is true that wherever the same end can be obtained by amendment, the court will not permit a supplemental bill to be filed: Mitford, 62.

But, new matter or events which have arisen since the filing of the original bill, cannot be set up by amendment and if intended to be invoked as a ground for relief, a resort must be had to a secondary bill. Now, in this instance, the share or interest of the defendant in the estate of his deceased mother existed and was just as perfect before and at the time of filing the original bill as it was afterwards and, by amending the bill, the complainants could have a decree against the defendant Brinckerhoff, compelling him to assign the claim to a receiver, to be collected and applied to the payment of their debt. If, however, it was necessary or, if not actually necessary, if it was proper to make John L. Lawrence a party defendant, in order, directly, to reach the fund in his hands as administrator, that course could only be pursued by means of a supplemental bill. Mr. Lawrence, it appears, did not become such administrator and possess himself of the assets until long after the original bill was filed; and having funds in his hands belonging to the defendant, as this bill now shows, I cannot undertake to say that it was improper to make him a party and to ask that he be decreed to apply so much of it as may be neces-

sary to satisfy the judgment debt of the complainants and to have him enjoined, in the meantime, from paying the money over to the defendant. This specific relief, it seems to me, the complainants have a right to ask for; and, having that right, it is only available to them by a supplemental bill.

If the complainants had been content to seek payment out of their specific fund, through the medium of an assignment by the defendant to the receiver in the cause, it might have been necessary to have done no more than to amend the bill by alleging the existence of the property in the hands of Mr. Lawrence under a grant of letters of administration, although subsequent: such a bare allegation being admissible as an amendment within the exception to the general rule adverted to by the chancellor in *Buck v. Buck*, (4 Saratoga Sentinel Reports, 45.)

Order, that the demurrer be overruled, with costs.

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v.
BREWSTER.

PATTERSON v. BREWSTER and others.

Although there may be a partnership in the use and working of land, there cannot be one in the buying and selling of real estate, so as to carry with it the rights, powers, duties and responsibilities of partners under the law merchant.

Where an association is formed for the purchase, sale and improvement of real estate and its trustees, (pursuant to its articles,) effect sales and buy in their own names individually and so give their own bonds and mortgages, a seller cannot follow the associates where the trustees become insolvent. It might be otherwise, however, where the sale was made on the credit of the capital of the association and on that of the parties where their shares have not been paid in. A right to sue on an original simple contract indebtedness is merged when a higher security is taken, for example, a bond and mortgage.

The fact of the death of some shareholders in an association does not create a difficulty sufficient to justify a suit in equity in order to make all contribute to pay a debt.

Jan. 24, 25,
1844.

Partnership.
Land.
Association.
Trustees.
Death.
Shareholder.
Bond and mortgage.
Cause of suit.

BILL against some of the members and the representatives of other members of a joint stock association, formed under articles of agreement dated the twenty-eighth day of September in the year one thousand eight hundred and thirty-five, for the purpose, as therein expressed, "of purchasing, selling and improving real estate in the city of Pittsburgh and its immediate vicinity and for no other purpose," and called the *Pittsburgh Land Company*. The company or association was to continue for three years. Its capital was fixed at one hundred thousand dollars, divided into shares of five thousand dollars each. The subscribers were each to contribute the number of shares set opposite their names. Messrs. Wetmore and Havens were constituted the agents, attorneys and trustees for the accomplishment of the objects of the association. They were to make all the purchases, take the titles in their names and, then, to execute declarations of trust in favor of the associates. Under the trust, they were to effect sales and exchanges of the property and give and receive mortgages. The nett proceeds and mortgages taken on sales were to be divided

by them amongst the associates ; and they were to convey the lands undisposed of in fee to the associates, whenever required, in proportion to the shares held by them respectively.

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In the month of September, in the year one thousand eight hundred and thirty-six, the agents, Wetmore and Havens, purchased of the complainant, at Pittsburgh, certain real estate at that place ; and, for which, they received a conveyance under the trust for the benefit of the association ; paid a part of the consideration money ; and, for the balance of thirty-two thousand dollars, they, the agents, gave their individual bonds, five in number, each for the payment of six thousand four hundred dollars, with interest, in two, three, four, five and six years from their date and, also, a mortgage of the same premises to secure the payment of the bonds. These bonds were executed under their hands and, what purported to be their seals (a scroll being a seal according to the laws of Pennsylvania.) The bonds were in the names of Wetmore and Havens as obligors and not in the name of the company or as agents, attorneys or trustees of it. The bonds remaining unpaid and the obligors, Wetmore and Havens, having become insolvent, the bill was filed to compel the associates of the company to contribute and pay the bonds or the debt thereby created.

The bill did not contain any averment that the defendants had not theretofore contributed and paid up the whole of their respective subscriptions to the capital of the company ; but it proceeded on the ground that the purchase having been made on account of and for the association by their authorized agent and having been accepted by such association, they, its members, were jointly and severally liable to pay the balance of the purchase money remaining due ; and it prayed that they might be decreed to pay accordingly.

The defendants interposed a general demurrer.

Mr. *Lord* and Mr. *Wood*, in support of the demurrer.

Mr. *M. Hoffman*, for the complainant.

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Dec. 26.

THE VICE-CHANCELLOR :—The claim made by the bill is attempted to be supported on the ground of a liability attaching to the defendants as partners. It appears to me, however, that, considering the object of this company or association, it is not to be deemed a partnership in the mercantile sense of the term with the rights, powers, duties and responsibilities of partners belonging to the associates under the law merchant. There may be a partnership in the use or working of lands, as in the business of farming, mining or manufacturing, where the law merchant will apply and govern, as in ordinary partnerships which directly relate to merchandize or mercantile affairs. But, in the buying and selling of lands for profit, on the joint account of several, as in this instance, the lands retain all the characteristics of real estate. It is bought—and it is sold—as such ; the title is taken to the purchasers either in joint tenancy or as tenants in common or in the name of a trustee upon certain declared trusts ; and, as real estate, it is sold and conveyed or, if it remain undisposed of, it descends to the heir. One joint tenant or one tenant in common cannot bind his co-tenants by any contract he may enter into in relation to the lands so held ; each one must contract for himself and for his own share and interest.

Their liability arising out of the fact of ownership alone is several and not joint and several. Each one must contract for himself and in relation to his individual share. There is no implied allegation of authority among them that one may contract debts on account of the estate generally so as to be binding on all. In short, there are, among joint owners of this species of property, none of the incidental powers which belong necessarily to one of several joint owners of merchandize, chattels or personal property of any sort where the possession of one is the possession of all, and all, in respect to the ownership, are but as one person. For the sake of convenience and the easier management of all partnership concerns, whether it be in the trade of buying and selling merchandize, in manufacturing or in the business of working lands either for agricultural or mining products, one partner has the power to bind all by any contracts he may make which are

within the scope of their partnership business. But this cannot be the law in the mere business of buying and selling lands. In all such cases, the courts can only undertake to enforce the contract as actually and fairly made. Now, the contract, in this instance, for the purchase of the lands of the complainant, was made between him and Wetmore and Havens. They purchased in their own names; took the title in their own names; and gave security in their own bonds and mortgages for the balance of the purchase money. Although the bill alleges that this purchase was made for the account of the Pittsburgh Land Company as provided for in the articles of association, yet, this must be understood only as a matter between Wetmore and Havens, as agents and trustees on the one part and the association on the other part. For, as to the complainant, it is not alleged in the bill that Wetmore and Havens were not the principal contracting parties with him, nor that he dealt with them as principals and agreed to take them as his paymasters as their bonds import.

No fraud or imposition is alleged to have been practised in order to induce the complainant to take their bonds. It is not even alleged that the sale of the land was made on the credit of the capital of the company or of the individual associates or that he was mislead or deceived when he made the contract of sale and consummated it by his deed of conveyance and the acceptance of the bonds and mortgages.

The court must, therefore, intend that he made his contract to sell on the personal responsibility of Wetmore and Havens and upon the mortgages by way of further security. He must not complain if he is left with no other or better remedy than the securities which he holds can afford him.

But, if the contract was originally different, so that the complainant might have resorted to the associates in an action for the purchase money, he has waived it by taking a higher security. The simple contract indebtedness is merged in the bonds and he is precluded from resorting to it: *Penny v. Martin*, 4 J. C. R. 566; and *Robertson v. Smith*, 18 J. R. 459.

Again: the remedy is at law if there be still a partner-

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ship indebtedness. The circumstance that some of the members have died who are now represented by executors or administrators ought not, in my judgment, to induce a resort to this court, without first going against the survivors at law and ascertaining whether the debt can be collected out of the joint property in their hands. The decision of Sir John Leach, M. R. in *Wilkinson v. Henderson*, 1 Mylne & K. 583, seems to me contrary to principle; and I am not content to adopt it as a rule for the court of chancery of this state.

Demurrer allowed, with costs; but with leave to the complainant to amend his bill, if he can, by alleging the sale to have been made on the credit of the one hundred thousand dollars of capital subscribed and of the individual subscribers and that they or some of them have not paid up their subscriptions, &c.

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v.
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LAWRENCE, Administrator of Lawrence, deceased, v.
LAWRENCE.

An order may be entered for a further answer upon exceptions for insufficiency submitted to, before exceptions taken for impertinence are disposed of.

Matter in an answer complaining of acts of the complainant, but which cannot avail the defendant in the suit, is impertinent.

Repetition is impertinence.

Where a complainant, as administrator, had been the professional adviser of the defendant and a deed, made and executed while the professional relation existed, might come into question in this suit, the defendant was allowed, in his answer, to set up the fact of such relationship; although it would have been better to have objected in the surrogate's office to the appointment of that person as administrator.

EXCEPTIONS for insufficiency and impertinence had been taken to the defendant's answer; and he had submitted to those which were taken for insufficiency. On the twenty-fifth day of January, one thousand eight hundred and forty-four, the complainant gave notice to the defendant of an order having been entered requiring him to put in a further answer to the exceptions so submitted to within twenty days, &c.; and, on the thirtieth day of the same month of January, a notice to refer the exceptions for impertinence was also served. A motion to set aside this last order was now made. It was founded on an affidavit, made by the defendant, which showed: that he considered the said exceptions for impertinence to be waived by the order for a further answer and he had commenced the drafting of such further answer in conformity with the said order; that he deemed all the parts of his answer excepted to for impertinence as pertinent and essential to his defence, which he believed to be good and valid, but that should such parts be expunged by order of the court, his further answer, as drafted in reference to the existing answer, would be materially varied and, in a great degree, useless.

It appeared that the complainant had consented to an extension of the time to put in a further answer (to the excep-

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Pleadings.
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tions for insufficiency submitted to) so that the twenty days allowed for this purpose was to commence only from the time that the exceptions for impertinence were fully disposed of.

Mr. *W. B. Lawrence*, in *pro. per.* and in support of the motion.

Mr. *G. M. Ogden* and Mr. *W. H. Harrison*, contra.

Feb. 13.

THE VICE-CHANCELLOR :—I find nothing in the rules of the court which forbids the entry of an order for a further answer upon exceptions for insufficiency submitted to until exceptions for impertinence, taken at the same time, are disposed of. Nor do I see how the taking of such a step, in relation to the former, can be a waiver of the latter. They are not inconsistent proceedings, nor within the reasons for the practice laid down in *Hart v. Small*, 4 Paige's C. R. 333 and *The New York Fire Insurance Company v. Lawrence*, 6 Ib. 511 ; and any inconvenience or difficulty which the defendant may have, in drawing his further answer correctly while there is an uncertainty about parts of his original answer being retained, is obviated, in this case, by the complainant's proposed stipulation and of which the defendants can still have the benefit.

*Order* : that the defendant's motion to set aside the order of reference of the exceptions for impertinence be denied, with costs to be taxed ; and that the defendant have twenty days, after the exceptions for impertinence are finally disposed of in which to put in his further answer upon the exceptions for insufficiency.

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*July 1st, 1844.* The exceptions came before the court, on the defendant's exceptions to the master's report ; and they will be sufficiently understood by his honor's opinion.

Dec. 10,  
 1844.

THE VICE-CHANCELLOR :—Fourteen exceptions are taken to the answer of the defendant William Beach Lawrence for impertinence. The first, second, third, tenth and fourteenth have been disallowed ; and all the rest are allow-

ed by the master. The defendant excepts to his report in respect to all the exceptions allowed.

The matter of the fourth, fifth, sixth, seventh and thirteenth exceptions are of the same character and—depending on the same principle—may be disposed of together. It is a mistake to say that the parts of the answer, pointed out by these exceptions, are called for by the bill. The bill does, indeed, allege the existence of prior mortgages and that suits had been commenced on some of such mortgages and that similar suits, on other of such mortgages, would probably be commenced. This is alleged for the purpose of showing the insecurity of the mortgage debt represented or claimed by the complainant and the propriety of his having a receiver of the rents of the mortgaged property.

The defendant admits the existence of the prior mortgages and the filing of some bills of foreclosure prior to the filing of the present bill; and states that certain bills have been filed since, and then adds that the latter “have been occasioned by the filing of the complainant’s bill.” And again, that suits have been commenced to foreclose some of the mortgages “and principally as before mentioned in consequence of the proceedings of the complainant.” It is to these repeated assertions the five exceptions in question refer. If they remain in the answer, they may of course lead to the taking of a good deal of testimony and that too possibly of a very circumstantial nature, in order to support them. And supposing them to be true or to be proved, I am at a loss to perceive how such facts can be of the least force or avail in this suit to the defendant. If, as the answer asserts, there is nothing due to the estate of Isaac Lawrence upon or by virtue of the present mortgage or if the complainant, as administrator, had no title to this mortgage or right to control it or to file this bill or for any other cause this bill must be dismissed, the court cannot undertake in this suit to make compensation to the defendant for any injury or loss or detriment to his property occasioned by foreclosures and sales under other mortgages. And, on the other hand, if the defence set up does not succeed (and the matters in question are distinct from the matters of defence) then it follows that the complainants had a right to file this bill and the conse-

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quence of filing it as stated must be attributed rather to the misfortune of the defendant than to the fault of a rightful complainant. It is said that if these five exceptions are well taken, then the master ought to have allowed and not disallowed, as he has done, the tenth exception. There is a similarity; and the seeming inconsistency in allowing some and disallowing another, is reconciled in this way: that the defendant has left to him, in the answer, the benefit of the fact in pleading, namely, "in consequence of the filing of this bill &c. other foreclosure suits were commenced" and it was unnecessary to repeat again and again in other parts of the answer the same allegation; such repetition constituting impertinence. I think the master was right, even on this ground, in allowing the other five exceptions.

Then, as to the fifth exception. This part of the answer appears to be a reiteration, in substance, of previous statements introduced to show that at the time of executing the deed to J. G. King, in trust for his wife, he was not insolvent and that his wife was justly and equitably entitled to hold the provision made for her as an equivalent for her right of dower which she had parted with. All this and everything else in relation to the complainant's conduct in bringing upon the defendant his misfortunes, annihilating his credit and producing sacrifices of his property is so fully stated in other places of the answer as to render this portion of it in the eighty-fourth, eighty-fifth and eighty-sixth folios unnecessary and so far as any thing new is stated about the complainant's taking his note to offer for discount at bank, as being evidence that the complainant could not have believed the defendant insolvent at that time, is quite immaterial. It is, moreover, argumentative, prolix and against the rules of good pleading. The master was right in allowing the exceptions.

I am not satisfied with the allowance of the ninth exception, although the statements of the bill cannot, I think, involve any breach of professional confidence, because they are not disclosures made in the shape of testimony; and if the defendant has any right to object that his former legal adviser should be the complainant in a bill against him, he should have objected before the surrogate to his appointment

as administrator, on the ground that the performance of his duty, in enforcing the mortgage, might lead to a breach of professional confidence, yet this part of the answer may, possibly, have some bearing upon the question in relation to the validity of the deed and as having been made under legal advice or while the relation spoken of existed. This part of the answer may, therefore, remain.

The eleventh exception should, also, in my opinion, have been disallowed. The exception is too broad. It covers some words that ought to remain, so that the previous denial might not stand as a negative pregnant. All after the words "settled" is improper; but down to and including that word is properly a part of the denial. As an exception for impertinence must be allowed *in toto* or fail altogether, this exception must be deemed to have failed.

The twelfth exception is well taken. It can be of no consequence, for the purposes of this suit, how or by what means the defendant's circumstances have become impaired; and I think he has no right to be so constantly throughout this long answer attempting to cast reflections on the complainant's official conduct in this business.

*Order*, that the sixth and seventh exceptions to the master's report in respect to the allowance of the ninth and eleventh exceptions to the answer be allowed; and that all the other exceptions to the report be overruled. And that the report, in respect to the allowance of the fourth, fifth, sixth, seventh, eighth, twelfth and thirteenth exceptions to the answer, stand confirmed; and that the clerk expunge accordingly. That the defendant pay the complainant's costs of the seven exceptions which are finally allowed, but no costs of the reference—as to which, each party is to bear his own. That the defendant also pay the complainant's costs on the hearing of the exceptions to the report to be included in the same taxation, but not to exceed ten dollars.

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## SPRINGER v. VANDERPOOL and another.

Where a complainant, in a judgment creditor's suit, takes the benefit of the bankrupt act, the same becomes defective and can only be proceeded in by his assignee filing a supplemental bill. *It seems*, that if the assignee refused to do this, the original complainant might proceed making such assignee a defendant.

Feb. 5,  
1844.  
Pleading.  
Parties.  
Bankrupt.

JUDGMENT CREDITOR's bill against Jacob Vanderpool (the debtor) and Frederick S. Vanderpool, to whom he had assigned certain leasehold premises.

A decree was had ; and thereby the assignment was declared fraudulent and void and the assignee, Frederick S. Vanderpool, was ordered to join in assigning to a receiver, who had been duly appointed.

A motion was now made for an attachment against the defendants, the Vanderpools, for not executing a transfer to the receiver.

It appeared that the complainant, Benjamin H. Springer, had applied for his discharge in bankruptcy under the act of Congress of February 17, 1843 ; that the defendants had no knowledge or information of it until after the entry of the final decree in the cause ; and that the defendants had taken no step in the cause since they came to such knowledge or information.

These defendants claimed that, by the decree in bankruptcy, the suit abated ; and that all proceedings subsequent thereto were null and void and, so, no attachment could issue—referring to *Sedgwick v. Cleveland*, 7 Paige's C. R. 237.

Mr. *Woodhull*, moved for the attachment.

Mr. *Wetmore*, contra.

THE VICE-CHANCELLOR :—This case falls within the chancellor's decision in *Sedgwick v. Cleveland*, 7 Paige's C.

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R. 287. The suit has become defective, not abated, by the bankruptcy of the complainant. It may still be prosecuted, but not by or in the name of the complainant. The assignee in bankruptcy may go on with it—and such is the effect of the provision of § 3 of the bankrupt act; but in doing so, the assignee must conform to the practice of this court by making himself a party by filing a supplemental bill as shown by the chancellor in *Sedgwick v. Cleveland*.

If the assignee will not consent to do this, then, perhaps, the present complainant may be allowed to proceed, by a supplemental bill, making his assignee a party defendant and suggesting his refusal to proceed with the suit as a complainant, &c.(a) However that may be, the present motion, for an attachment against the defendants must be denied, with costs to be taxed.

(a) See, *Brebner v. Thompson*, 2 Molloy, 433, and note there.

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## COSTER v. GRISWOLD.

In the absence of fraud or failure of title, a surety, who guarantees notes given on the purchase of lands, cannot be relieved on the ground of hardship, inadequacy of consideration or extravagance of price.

Where a purchaser covenants and makes a pledge that the lands he sells shall, within a certain period, command a certain price and this is shown to have been impracticable and he becomes insolvent and his pledge inadequate, an equity arises in favor of the buyer, as well as of his surety, on notes given for the purchase money, so long as such notes remain in the hands of the seller on a bill *quia timet*. But, if an absolute assignment of the notes, in good faith, has taken place, for consideration, before causes for filing the bill arise or a right of set-off attaches or other equitable claim occurs, the assignee can hold irrespective of any after accruing right or equity. In such case, the court secures the equities which the debtor had against the original creditor up to the time of assignment. And such equities are not lost by a mere pledge of the notes by the seller—they continue up to and until a *bona fide* assignment as aforesaid.

Affidavits, denying the truth of matter proposed to be inserted in a bill by way of amendment, form no sufficient objection to the application to amend.

Proposed amendments, by executors, to a bill filed by their testator, can be allowed, although embracing statements which may never have been made by him and although they render no excuse for their not having been brought forward originally.

*It would seem*, that less strictness should be allowed in amending a bill where no injunction is in force or necessary to be sustained.

It is not usual for this court to grant an injunction to restrain actions in the federal courts, but leave a party to apply there to stay them until the equitable relief is granted here—confirming the case of *Schuyler v. Pelissier*, vol. 3, 191.

February,  
13, 15, 16,  
1844.

Practice.  
Pleading.  
Injunction.  
Principal  
and surety.  
Vendor  
and purchaser.  
Bill quia  
timet.

In order to reinstate an injunction pending an appeal, a case must be made showing something like irreparable injury if not allowed; but, even then, the application should be made to the chancellor.

THE bill in this case, filed by John G. Coster, showed that one Jerry Cowles offered, by letter, to sell, to the Oswichee Land Company, twenty-eight thousand acres of land in Georgia for one hundred and sixty-eight thousand dollars, payable in the company's bonds at one, two and three years, to be guaranteed by the complainant, John G. Coster; the said Cowles to be interested in one-fourth, and to guarantee to the company that the lands should sell, within five years, for the full amount of the purchase money—and all his in-

terest, being one-fourth and two-tenths in the original property of the company, should be subject to the obligation of indemnifying the company for any loss from this purchase. The proposition was not accepted. On the tenth of May, in the same year, he extended his offer sixty days, from the first of April, to sell thirty thousand acres at five dollars per acre; and, if accepted by the company, his guarantee was general and extended beyond the specific security offered above. This offer was accepted by the trustee of the company, Hamilton; and, sometime in May, the said Jerry Cowles conveyed the lands, by deeds dated the twentieth day of April, one thousand eight hundred and thirty-eight to Hamilton, as trustee of one fourth for Coster and Heckshers; one-fourth for Pettigrew, one-fourth for the said Cowles, and one fourth for the said Hamilton. Simultaneously with the deeds, Hamilton, as trustee, executed twenty-eight bonds, to the amount, in the aggregate, of one hundred and fifty thousand dollars; they were all dated on the first of May, 1838, and became due in the years one thousand eight hundred and forty, one thousand eight hundred and forty-one, one thousand eight hundred and forty-two and one thousand eight hundred and forty-three—they were in sums of seven thousand five hundred dollars and five thousand dollars, and all made to carry interest at seven per cent. half yearly. Mr. Coster's guarantee was endorsed on each note under date of the first day of May, one thousand eight hundred and thirty-eight. His guarantee was gratuitous, being made at the request of his associates and on the faith and guarantee and assurance of Cowles as to the ultimate sale of the lands. And, simultaneously also with the execution of the deeds and delivery of the bonds, Cowles executed and delivered to the associates an indenture, dated the ninth day of May, one thousand eight hundred and thirty-eight, reciting the whole of the transactions; and covenanting that the lands should be sold or capable of being sold within five years from the date for the full amount of the purchase money; that this amount might be realized by selling at public auction within six months afterwards all such of the said lands as might be unsold at the end of the five years; and if, after the whole of the lands should be sold within

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five years and six months after this date, the whole amount of money accruing from the sales should fall short of the aforesaid purchase sum of one hundred and fifty thousand dollars and the interest thereon, then he, Cowles, would indemnify and save them harmless against any loss by reason of the said sales of the said lands producing a less sum than the said one hundred and fifty thousand dollars and interest. And he, therein and thereby, mortgaged and pledged the whole of his share and interest in the company, &c., for the fulfilment of such, his guarantee, with this further understanding and agreement between the parties that, at the expiration of the five years, should the one hundred and fifty thousand dollars, with interest, not be refunded to the company by the sale of the Georgia lands, that, then, Hamilton for the company should put up such of the Georgia lands as remained undisposed of to be sold for cash at auction, giving six months previous notice and if, from the said sale or attempt to sell, the balance of the one hundred and fifty thousand dollars, &c., should not be produced, then, the one-fourth interest of Cowles in the company should be advertised to be sold for cash, giving six months notice by advertisement, unless, indeed, the company should agree to take Cowles's share at private sale upon terms to be agreed on. The five years expired on the ninth day of May, one thousand eight hundred and forty-three. The lands had not, nor had any part been sold, nor were they capable of being disposed of except at an enormous sacrifice on the cost, and all attempts by the trustee to sell had been unavailing. One half of the company's bonds, to the amount of seventy thousand dollars, with forty thousand six hundred and twenty-five dollars for interest, had been paid by them. No part of these payments were made by Cowles or came out of his interest or share in the company; but the greater part was paid out of money obtained by means of Coster's, the complainant's, credit and for the amount of which he was then liable. In the autumn of the year one thousand eight hundred and forty-one, the said Jerry Cowles became embarrassed. The company were, then, apprehensive that the lands would not sell within the five years, except at a very great sacrifice; and that Cowles would be unable to indem-

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nify them. They determined to pay no more principal or interest. Cowles, shortly after, became utterly insolvent; was declared a bankrupt; and obtained his discharge. The interest of Cowles in the company (independent of the Georgia lands) afforded no security whatever by way of indemnity. All the other associates of the company were insolvent or unable to pay any portion of these bonds and the whole burthen of them rested on the complainant, Coster. Two suits at law had been commenced against him on his guarantee. In one suit, six of the bonds were declared on, each for five thousand dollars, payable the first day of May, one thousand eight hundred and forty-two, and one for seven thousand five hundred dollars, payable at the same time—and for twenty-seven thousand five hundred dollars for interest from the first of May, one thousand eight hundred and forty-two. These were the remaining fourteen bonds, amounting to seventy-five thousand dollars. The suits were in the name of Cowles, but it was alleged they were for the benefit of the defendant George Griswold and others, who had obtained the bonds under a blank assignment endorsed upon each note, signed by Jerry Cowles under date of May eighth, one thousand eight hundred and thirty-eight, (the time when they were made.) About the tenth day of May, one thousand eight hundred and thirty-eight, Cowles obtained an advance of seventy thousand dollars from the United States Bank in their post-notes, for his note of seventy thousand dollars at nine months and by a deposit of the fourteen bonds as collateral security. Cowles's note fell due the tenth day of August, one thousand eight hundred and thirty-nine and was not paid. On the twenty-eighth of the same August the agent of the United States Bank at Macon in Georgia gave notice to Cowles that the Bank would sell the bonds at auction in New York sometime in September or October then next, and would give sixteen days notice of the time and place of sale in the Express and Commercial Advertiser newspapers; but no such notice was ever given and no such sale was ever made; and, on Cowles coming to the city of New York, it was postponed indefinitely and no other notice or sale had ever been given or made. On the second day of October, one thousand eight hundred and

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forty-one, the said Cowles went to Philadelphia, and, wishing to take up his note for seventy thousand dollars and withdraw the bonds deposited as collateral security, tendered to the then president of the bank sixty-five thousand nine hundred and ninety dollars in the notes of the bank in full payment of the amount then due on his note. This tender was declined and the delivery up of the note and bonds was refused, under pretence that the latter had been disposed of and the proceeds credited to the account of the note, leaving a balance of twelve hundred and forty-four dollars and eighty-seven cents; and the account in relation to which was set out in the bill. The said Cowles requested to be informed as to who were the purchasers of the bonds, when the cashier of the bank informed him that, as to the sale of nine of the bonds amounting to forty-seven thousand and five hundred dollars disposed of at twenty per cent. discount, as credited on the first day of March, one thousand eight hundred and forty-one, he could not say to whom they were sold, nor whether at public or private sale, but, as to the sale of five of the bonds, equal to twenty-seven thousand five hundred dollars, as credited on the sixth day of August, one thousand eight hundred and forty-one at ten per cent. discount, they had been sold to the defendant, George Griswold and Richard Alsop at private sale. That Cowles never had received any notice of such sales and the above was the first intimation he had ever had that the fourteen bonds had been parted with; and he, immediately thereafter, say on the second day of October, one thousand eight hundred and forty one, gave notice that he should repudiate the sales as made in fraud of his rights. By a statement set out it appeared that the balance due on his note was sixty-five thousand two hundred and twenty-six dollars and sixteen cents; and it was alleged that this was all that was due and that it was fully covered by the tender. It was stated that Cowles never made any assignments to Griswold or any other person—nor did the bank make any in writing; and also averred that no consideration passed or was paid at the time for the bonds by Griswold and Alsop, but that the bonds were delivered in pursuance of some private understanding and on account of antecedent matters and in fraud of Cowles's

rights. That the bank had no right to sell or part with the possession of the bonds and such act was wholly unwarranted and unlawful. That the defendants took them subject to all the equities existing between the bank and Cowles and had acquired no right or title to the bonds. The complainant was advised and insisted that Cowles's agreement and covenant of the ninth day of May one thousand eight hundred and thirty-eight limited his, the complainant's liability as surety of the bonds and that his guarantee was subject to the provisions of that instrument and went with the bonds wheresoever they went. Also, that the consideration of the bonds had wholly and entirely failed and was no longer of any effect or, at all events, that he was entitled to a deduction of the difference between what the lands should produce on a sale and the consideration money and interest agreed to be paid. The complainant insisted that the present holders of these fourteen bonds had no right or title to them and ought not to be allowed to prosecute them; and he was desirous that the lands in Georgia should be sold—and there were no means of determining what the ultimate deficiency would be except by an actual sale; and he could not interpose his just and proper defence at law in the suits brought against him; and insisted that the further prosecution of them should be stayed until a sale could be made and the deficiency ascertained. *Prayer*: that the lands might be sold under the direction of the court; that Hamilton, the trustee, might join and execute deeds to the purchaser; that the proceeds might be applied on the bonds, &c., and that the complainant might have the benefit of the deficiency which Cowles might be found liable for and that the fourteen bonds should be delivered up. And an injunction against the further prosecution of the suits at law.

An injunction had been granted.

By a joint answer put in, it appeared: that the defendant George W. Gray, the son in law of the defendant George Griswold, was the assignee of the nine bonds for forty-seven thousand five hundred dollars and was prosecuting one of the suits on behalf of himself, George Griswold, Nathaniel L. Griswold and Richard S. Griswold, composing the firm of N. L. & G. Griswold, who bought an interest of forty-

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three thousand and seven dollars and eighty-nine cents in the said note of Jerry Cowles. That the purchase took place about the first day of March one thousand eight hundred and forty-one; and that there was then due on the note the sum of sixty-seven thousand nine hundred and seven dollars and twenty-one cents. That they purchased that interest for a good and valuable consideration. And as to the remainder of the note, that the same was purchased from the United States Bank on the sixth day of August one thousand eight hundred and forty-one for a good and valuable consideration by the defendants Richard Alsop and George Griswold. That when the said Alsop and George Griswold purchased the five bonds, with the guarantee on each and the assignments in blank, they were delivered to them to be held as collateral security for the payment of the amount of their interest in the note and had always since remained in their custody and possession and in that of the executors of Alsop; and so it was with the nine bonds purchased by N. L. & G. Griswold and held as collateral security for the payment of the amount of their interest in the note. That the assignments on the bonds were in blank, on the eighth day of May one thousand eight hundred and thirty-eight, but, about the times of their purchase, the assignments were filled up with the name of the said George W. Gray, who was, thus, constituted a trustee for the said N. L. & G. Griswold; and the remaining five were filled up with the names of R. Alsop and George Griswold by themselves. The defendants insisted that they had a valid title. They stated, on information and belief, how the United States Bank, through Nevins and Townsend, as agents for Jerry Cowles, took the note of seventy thousand dollars for value received by him of the bank and the fourteen bonds, with the guarantees and assignments in blank as collateral security for the payment of the note. That the deposit of the bonds was made with the knowledge and approbation of the complainant and Hamilton; and that the funds thereby procured were applied to their use and the use of their associates in the Oswichee Company. They submitted that by the delivery of the note and the bonds to the bank, the said Cowles authorized the filling up of the blanks in the assignments to any holders.

They admitted that there had been no other written assignments or other transfer of the title than the said deposit for the purpose of collaterally securing the payment of the note ; and that all the rights of Cowles, as owner of the fourteen bonds, subject to the deposit, were reserved to and retained by him and had never been given up or relinquished ; and that the note became due on the tenth day of August one thousand eight hundred and thirty-nine and was not paid. The defendants further answered that they did not know and could neither admit nor deny the notice of the United States Bank at Macon about selling the bonds in September and October, 1839, or that no notice of sale was ever given ; but admitted that the bonds were not advertised or exposed for sale at any time in the city of New York. They said they were ignorant of any tender having been made. They admitted that sixty-five thousand two hundred and twenty-six dollars and sixteen cents was the whole amount due upon the note on the second day of October one thousand eight hundred and forty-one ; but they denied that the suggested tender of bank notes was equal to that sum or that the bank had any interest in the note or bonds at that time. And as to their purchase they said that the interest in the note purchased by N. L. & G. Griswold was paid for by them to the bank in lawful money of the United States actually advanced at the time of the purchase and as the consideration for the same and that, ever since, such slice of the said note and the bonds collateral thereto had been and were their sole property. That the interest in the note purchased by Alsop and Griswold was obtained for a *bona fide* consideration, the full value whereof was received by the said bank at the time in part payment thereof and in lieu of so much money then due to them and payable on an award made in their favor against the bank by arbitrators. They denied all knowledge and notice of any equities against the note or the fourteen bonds or any defence against the payment thereof ; and that they took them in the confidence that the complainant, from having paid the interest from time to time as it accrued, had recognized the validity of the bonds and that they had been given to Cowles to be negotiated by such transfer for the benefit of the complainant and his associates.

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They denied that no consideration passed at the time, &c. ; and submitted that they had a good title and had good right to hold, free from any counter equities. They insisted that it was apparent from the face of the bonds and guarantees that they were made with the design and intent to pass into the hands of persons other than Cowles and to be available to whomsoever might become the lawful holders. Also, that the same were not limited or controlled by Cowles's covenant of the ninth of May one thousand eight hundred and thirty-eight and were not subject to a deduction for any loss or difference in the sale of the lands, &c. That if such had been the complainant's intention, he should have expressed it by some words in his guarantee or by some memorandum on each bond. And they submitted that they were not necessary parties to the bill for the purpose of a sale of the lands ; and insisted that it would be unjust to stay their suits at law until such sales could be had.

A motion was now made to dissolve the injunction on bill and answer.

Mr. Bidwell and *Mr. G. Griffin*, in support of the motion.

Mr. J. P. Hall and *Mr. Lord*, contra.

March 11, THE VICE-CHANCELLOR :—There is no difficulty about
 1845. the facts of the case as presented by the bill and answer. Much of the bill stands uncontradicted by the answer and is, therefore, to be taken as true for the purposes of this motion ; and upon the statements of the bill which are either admitted or not denied (because there are many things alleged which took place anterior to March one thousand eight hundred and forty-one of which the defendants were ignorant and can neither admit nor deny) the question arises—what are the equitable rights of the complainant ?

1st. As between the complainant and Cowles the obligee of the bonds ?

2d. As between the complainants and the assignees or present holders of the fourteen bonds in controversy ?

These bonds, with fourteen others, having been given for the purchase money of lands bought of Cowles and their

payment having been guaranteed by the complainant Mr. Coster in a manner to bind him in law as a surety, he cannot be relieved from his liability on the mere ground of hardship or of inadequacy of consideration or of the extravagance of the price agreed to be paid for the lands. No fraud is alleged in the contract of sale, nor any failure of title to the lands conveyed, so as to work a failure of consideration for the bonds. But, simultaneously with the conveyance and the giving of them and as a part of the same transaction, though varying a few days from the date of the other papers, the vendor, Cowles, executed, under his hand and seal, an instrument of covenant and agreement on his part (dated the ninth day of May one thousand eight hundred and thirty-eight) which had the effect to modify, very materially, the rights of the parties to that transaction as between themselves in relation to the benefit the purchasers were to derive from it. Whether the purchasers have taken the steps which were necessary with regard to the disposal of the lands, in order to bring themselves within the true meaning and interpretation of Cowles's covenant to remunerate and indemnify them against any loss or deficiency upon a resale, is a point upon which counsel have widely differed. According to my understanding of Cowles's covenant, however, and from what I believe to be its fair construction, the allegations of the bill, as to the utter impracticability of selling the lands during the five years or five years and six months within which he stipulated the lands should be sold or be capable of being sold at remunerating prices, show that a breach of his covenant has been incurred. And from this failure to sell the lands, taken in connection with the fact of Cowles's bankruptcy and the inadequacy of the security pledged by him to make good the loss or deficiency as averred in the bill, an equity arises in favor of the purchasers and of the obligor and guarantor of the bonds as against Cowles, to be relieved from the payment to him—at least, to the extent of such loss or deficiency. While, therefore, the bonds or any of them remained in Cowles's hands and even before the expiration of the five years allowed for the sales, upon well founded apprehension of ultimate loss satisfactorily made to appear, arising as well from Cowles's

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insolvency as from the impossibility of effecting sales "except at an enormous sacrifice upon the cost," this court would have entertained a bill, *quia timet*, for an injunction to restrain him from parting with the bonds or enforcing payment thereof to the full extent. This could have been done on the principle established in *Lindsay v. Jackson*, 2 Paige's C. R. 581.

It would be otherwise, however, if the right of a third person had intervened under an assignment or transfer for valuable consideration before cause for filing such a bill arose or a right of set-off attached or other equitable claim could be asserted to prevent a transfer; and where an assignee takes in good faith, his right to hold will not be disturbed or divested by any subsequent event or after-accruing right or equity of the debtor: *Chance v. Isaacs*, 5 Paige's Rep. 592. All that the court of law or equity can do in such cases, since they recognize and protect the rights of assignees of choses in action, is, to allow them to take, subject always to any defence, legal or equitable, which existed in favor of the debtor against the original holder or creditor at the time of the transfer or assignment. Now, the question arises: what existing equity or defence was there against these bonds or the right of Cowles to part with them in November one thousand eight hundred and thirty-eight, when he pledged and deposited the same with the United States Bank as collateral security for the payment of his note of seventy thousand dollars?

At that time (only six months after the giving of the bonds) Cowles had not become insolvent and no apprehension of a loss or deficiency from the sales of the lands was felt. Nothing had occurred to change the aspect of their affairs or to give rise to any restriction or claim upon him not to use the bonds in any way he might think proper. The bonds had, evidently, been made to be sold or transferred as his convenience or necessities might require: else, why so many bonds with a guaranty on each and in sums adopted to a convenient use by assignment and calculated to give them a sort of currency, instead of one bond for the whole debt of one hundred and fifty thousand dollars, payable by instalments or why was not Cowles put under a

stipulation, in his agreement of the ninth day of May one thousand eight hundred and thirty-eight, not to part with them or with that portion of them having the longest time to run, until, from experience, with regard to the disposal of the lands, some opinion could be formed of the probable results of their sales? No restriction was imposed upon the transfer, so that Cowles was at liberty, at any time, to sell and assign the bonds absolutely or to pledge and hypothecate them, as he did, to the bank; and it was competent for the bank to take and hold them as security. The only equity they were subject to, in the hands of the bank, was the equity of redemption or right to redeem by paying off the note. That right to redeem still exists and has followed the fourteen bonds in question into the hands of the present defendants, who, by their answer, admit that they took them from the bank—not by absolute purchase, but as collateral security for the payment of the shares or interests which they respectively bought in the seventy thousand dollar note in the months of March and August one thousand eight hundred and forty-one; and they admit, also, that the amount due on the note, when they bought it, was several thousand dollars less than its face. Whatever that amount is, as between the bank and Cowles, the defendants are entitled to receive and no more; and payment of the bonds should not be required beyond the amount that will be necessary to satisfy the note. All over and above the balance due on the note, with interest, the obligor of the bond and Mr. Coster, as surety and his representatives should be excused from paying: inasmuch as the surplus would belong to Cowles or his assignees in bankruptcy and, as to Cowles and volunteers claiming in his right, the obligor and surety are entitled to be protected; unless, indeed, the allegations of the bill, in relation to the unfortunate result of the speculation in the lands bought of Cowles, can be disproved.

Some reliance has been placed upon the tender in bank bills made by Cowles to the bank on the second day of October one thousand eight hundred and forty-one and which was sufficient in point of amount to cover the balance then due on his note. But, this tender was made after the bank had ceased to have any interest in the note, as is shown in

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the answer ; and I do not perceive how it can affect the rights which the defendants had then acquired.

The injunction, in my opinion, must be modified or so far dissolved as to allow the suits at law on the fourteen bonds in question to proceed to trial and judgment : but with a stay of execution on the judgments until the amount due upon the note, for principal and interest, is ascertained or can be determined either at law or by this court. And with leave, then, to apply to remove the injunction entirely.

Order accordingly. Costs to abide the further order of this court.

This case came again before the court.

The complainant, John G. Coster, had died on the eighth day of August in the year one thousand eight hundred and forty-four ; and the suit was revived in the names of George Washington Coster and Henry Arnold Coster, as his executors.

An appeal was pending from the above decision of the vice-chancellor.

By the death of the said John G. Coster, the actions at law in the supreme court had abated ; and since the modification of the injunction, two other suits had been instituted in the name of the defendant Jerry Cowles against the executors of the said John G. Coster in the circuit court of the United States for the southern district of New York.

The present complainants had filed a supplemental bill, praying for an injunction to restrain these actions in the United States Court.

Sept. 26.
 1845.

And, now, came up, not only a motion for such an injunction, but one to amend the original bill and a third to reinstate the original injunction pending the appeal.

The defendants, by affidavit, denied the truth of the matter contained in the proposed amendments ; and also insisted, on the argument, that such matter could have been inserted in the original bill during the life time of the original complainant, John G. Coster.

Feb. 24.
 1846.

THE VICE CHANCELLOR :—Three several motions are made : 1. To allow the complainants to amend the bill.

2. For an injunction on the supplemental bill to restrain the suits commenced in the circuit court of the United States. 3. If such injunction cannot be granted, then, to reinstate the injunction heretofore granted, pending the appeal from the order by which that injunction was so far modified as to allow the defendants (plaintiffs in the action at law) to proceed to trial and judgment in that suit.

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—
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I can perceive no substantial objection to the granting of the motion to amend. The allegations proposed to be introduced into the bill may be of importance in determining the case, provided they are supported by evidence; and the denial of them at this time, by affidavits, furnishes no sufficient reason why the complainants should not have an opportunity of putting the matter in issue and proving it, if they can. The new matter is not inconsistent with, but merely in addition to what is already set out in the bill. And the objection that executors cannot be allowed to add to a bill, by way of amendment, because their testator is thereby made to say what he never did say in his lifetime and that the executors cannot render a sufficient excuse for the testator for not bringing forward these allegations in the bill when first filed, seems to me not of sufficient weight to prevent the order being granted. It is not asked to make this amendment without prejudice to an injunction, because the injunction has been virtually dissolved and, perhaps, less strictness should be required in allowing amendments where the upholding of a preliminary injunction is not the object. The motion to amend is granted, on payment to the defendants of their costs of the motion.

Then, with regard to the granting of an injunction on the supplemental bill, to restrain the suits commenced in the federal court in the place of the suits in the state court which abated by the death of the testator John G. Coster. The objection rests upon that rule of comity, which this court has prescribed to itself, not to interfere with the proceedings of the Courts of the United States: *Schuyler v. Pelissier*, 3 Edwards's V. C. Rep. 191. Instead of awarding an injunction, the present complainants must be left to pursue the course pointed out in *Schuyler v. Pelissier*, by an application to the court in which the suits are instituted, to

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stay the proceedings therein until the matter of equitable relief can be heard and finally determined in the court of chancery. The motion for an injunction on the supplemental bill must be denied.

The complainants, then, ask, that the injunction, as originally granted, may be reinstated pending the appeal from the order virtually dissolving it. There are several palpable objections to this motion. In the first place, the injunction, if restored, would be ineffectual: the suits which it enjoined having abated and being no longer in existence. And to restore the injunction, with express reference to and operation upon the new suits in the circuit court of the United States would be the same, in effect, as granting an injunction on the supplemental bill—which, the court has shown, cannot be granted. Besides, if it is proper to reinstate an injunction pending an appeal from the order dissolving it, special facts and circumstances should be shown to render such a step necessary, in order to preserve the property in the meantime or to prevent irreparable injury: *Hart v. The Corporation of Albany*, 3 Paige's Rep. 381. Nothing of the kind appears in this case; and even if it could be shown, I am inclined to think that the application should be made to the chancellor, who, alone, has control of the appellate proceedings. This last motion is, also, denied, with costs to be taxed.

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McKEEN  
v.  
FIELD.

McKEEN v. FIELD and another.

An exception having no point and which, therefore, would compel the court to find out what was required to be answered, will be disallowed.

EXCEPTION to master's report on exception for insufficiency taken to an answer. The exception to the pleading was unskillfully drawn; and

March 13,  
1844.

*Pleading.  
Exception.  
Practice.*

THE VICE-CHANCELLOR said:—The answer appears, in its denials, to be pregnant, in some respects, with affirmative matter and is, somewhat, evasive—so that I should have no great difficulty in agreeing to the master's allowance of the exception for insufficiency; if it were not that the exception is so improperly and unskillfully drawn. It has no point. It is too general, copying, as it does, entire paragraphs of the bill and then going out of the bill into the answer and showing how imperfectly matters are stated in the answer which are not called for by the bill. If the defendants were now required to answer further, I think there would be great difficulty in bringing him to any point within the bill not answered, unless the court, by its order, should undertake to specify what more he should make answer to. The complainant should have done this himself by his exception. For this defect in the exception, I consider that it must be disallowed.

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RENWICK  
v.  
MACK.

RENWICK by her next friend, v. MACK and others.

Where several exceptions are taken for impertinence when one only should have covered the matter, the court will, as to costs, look at it as one exception merely.

April 2,  
1844.

On the argument of the exceptions for impertinence in this case,

*Pleading.*  
*Answer.*  
*Exception*  
*for Imper-*  
*tinence.*  
*Practice.*  
*Costs.*

THE VICE-CHANCELLOR stated that here were three exceptions for impertinence in matter which ought to have been embraced in one exception only; and that, on the question of costs, it would have to be so considered.

Mr. *Eddy*, for the defendant.

Mr. *Dana*, for the complainant.

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WARNER  
v.  
HOFFMAN.

WARNER v. HOFFMAN.

Where a complainant claims to make the remainder in fee of an estate, veated in infants, liable for a debt accruing for professional services performed in relation to the rights of the father and mother in such estate, it is necessary, for his success, that he should affirmatively show the debt in question was contracted for the preservation of the inheritance of the children or for its permanent improvement. And where this is not shown on the hearing, the court will not indulge him with a reference to a master to inquire how far his services contributed to preserve and benefit the inheritance so that a portion, at least, of the debt might be charged thereon.

In a creditor's suit, although there may have been a decree, the neglect or omission of one will not preclude his right to be afterwards let in, provided the other creditors are placed in no worse position or put to additional expense.

A REFERENCE is necessary to the case of *Dyett and wife v. The North American Coal Company*, 7 Paige's C. R. 9 and 20 Wendell's R. 570, for a statement of the facts out of which this suit arose.

The complainant, Mr. Henry W. Warner, had a claim of considerable amount for professional services; which, it was alleged, were rendered by him mainly for the preservation of the inheritance of the Dyett estate as well as for the protection of Mr. and Mrs. Dyett's interests as *cestuis que trust*; and, consequently, that he was entitled to a decree which should reach the inheritance or fee of the property and subject it to a sale for his benefit. This was a principal object of the bill in the present suit. The infant children of Mr. and Mrs. Dyett were entitled to the remainder in fee; and defended through their guardian *ad litem*. It will be seen, in the opinion of the court, that the complainant had leave to file the present bill.

Mr. *Henry W. Warner*, complainant in person. The priority obtained by creditors is a mere casualty and can give no advantage over him. The court will relieve against accident and mistake. The decree there is objectionable in itself, as well as by the means it was obtained. It was a

April 3  
and  
May 1,  
1844.

Debtor and  
Creditor.  
Heir.  
Reference:



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general creditor's bill. All creditors were to fare alike ; and yet some are postponed. But the counsel now arguing does not know he has any need to complain of that : it cannot affect him. He does, however, complain of the proceedings which led to that decree. He was not a party and yet is affected by it. Debts were allowed which ought not to have been. These absorb the rents and shut him out or diminish his chances. Master Mason went through the reference in one day. The bill alleges no proofs were taken ; and the answer does not deny it. All was done by consent. The complainant was a co-trustee and was never consulted about the propriety of advances embraced by the master's report. The fee of the estate belonged to the children and yet their estate is made to bear the burthen of supporting the parents. If this complainant was not bound to be a party to that reference, then he is now at liberty to controvert those allowances : *Pratt v. Rathbone*, 7 Paige's C. R. 269 ; and he insists that he was not bound to go into that reference with his demand, because most of his demand accrued before 1827, the period fixed. Even if a small part only was prior to that, he was not bound to submit to a loss of that, by going in to prove. But his claim is a legal one against the trust estate directly. The others were against Dyett primarily and secondarily only against the trust estate : *Story's Eq. Pl.* 104 ; *Parmalee v. Egan*, 7 Paige's C. R. 610.

The case of *Pickford v. Hunter*, 5 Sim. R. 122 is in point and the difference in favor of the present case is much stronger. The rule is that a party cannot come in whose debt does not stand on as good grounds as others ; and if he stands on better grounds he is not bound to come in. He is not bound to make a sacrifice of any thing. Here the debt is a legal and also an equitable one. Other's debts were equitable only. A legal claim is one in judgment, to be followed by an execution against the *corpus*. The complainant's services saved both the fee and the life estate in reversing the chancellor's decree in the Chapman suit, which would have swept it off. His right would give him an execution against the fee, subject to the life estate ; and if that were insufficient, then against the life estate. In this way let it be marshalled.

**Mr. Murray Hoffman**, defendant in *pro. per.* In all the litigation about this unfortunate trust estate, this is the first attempt to reach the capital of it. This capital, now vested in the infant children, is sought to be affected. The mother is now reduced to beggary; and the question is, whether the children are to share the misfortunes of their mother. The complainant's services have been great and meritorious; but, like other creditors, he may have to remain unpaid. A plausible appearance of right is not enough. He must bring his case clearly and fully within the rules in like cases or he cannot recover. He must hit the bird in the eye. Date must be attended to. The first bill was filed the fifteenth of August, 1834. The bill of the coal company, as amended, was filed in October 1833, making it a general creditor's bill. The order of reference in the complainant's suit was on the thirteenth of October, 1834 and on the sixteenth day of September 1836, master Clark made his first report. In January 1837, exceptions to it were heard. The second order of reference back was on the eighth day of June 1839. On the twenty-eighth day of June 1839, the master made an amended report. The order of reference in the coal company suit was on the twelfth day of February 1839. The master's advertisement appointed the thirteenth day of May 1839, for creditors to come in. His report is dated May 15, 1839. The chancellor's decree was made on appeal from the vice-chancellor the eleventh of September 1839 and the affirmance by the court for the correction of errors the twelfth of February, 1839. The complainant's present bill was filed the eighteenth day of October 1841 and the answers were put in a year or more afterwards.

As to the claim against the capital or estate in remainder of the children. The complainant's original bill, August, 1834, sets forth the marriage settlement and his claim for services rendered to the estate and to Joshua Dyett. The frame of it asserts the claim to be against Dyett and wife and their estate, (true, there were no children then, but four born since); and not against the trust estate at large involving the capital. The order of the thirteenth of October 1834, is to take an account of claims against the estate of Dyett and wife only. The master's report of the 16th of Septem-

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ber 1836, goes no further than to find an account due from Dyett and wife. From that time to June 1839, the children come into being and yet are not made parties. The decree, then, could not be made to touch their interests. The trustee's acts were not their acts: *Coal Co. v. Dyett*, 7 Paige, 12. The children were necessary parties if it were intended to bind their estate. Then comes the decree of the eighth of April 1841, which, on its face, shows that the court had not power to decree against the capital of the estate. Under the permission there given, the present bill is filed, making the infants for the first time parties. What is the case attempted to be made by this bill? It seeks to shift the liability established by the decree from the mother to the children. It is much stronger than the decree warrants.

Then, is their estate responsible for the debt. In order to make this out, the complainant is bound to show it beyond all question or doubt. No proof here that services were rendered for them or their estate for its preservation or in its consummation. The estate of Dyett and wife and of their children was always very distinct. The chancellor kept them distinct: 7 Paige, 13. There is no evidence that services were rendered for or on behalf of or even worked a benefit for the children's estate. It does not appear that their interest was ever involved or in danger. Nothing short of such positive evidence will answer the purpose. Master Clark's amended report shows costs and fees in the case of the coal company and of Prall, four last items one thousand one hundred and eighty dollars and ninety-one cents, for defending those suits. The future or contingent interests of the children were not involved or in danger. See the chancellor's opinion. There is only one instance of a litigation in which the complainant's services may have been important to the children, amounting to about one hundred and fifty dollars. This was the case of *Hammersley's Trustees v. Jacob Barker et al.* And the proofs do not show the services were essential to the protection of the infant's property. Proofs on this subject are not to be taken on a reference to a master. The complainant does not show he is entitled to any reference. The matter is put in issue by the pleadings; and proofs should have been taken before

the examiner: *Cox v. Allington*, 1 Jacob's Rep. 337; 1 Hoff. Prac. 498, n.

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Then, looking at the complainant as a trustee and a creditor, the bill seeks to make him a receiver. His mortgage was dated the thirteenth day of August, one thousand eight hundred and thirty-four, for one thousand two hundred and three dollars for advances to Jessy Ann beyond the rents. This mortgage is not against the infants or affecting their rights. As against the wife it is good and cannot be questioned. She had a right as a feme sole to bind her separate estate. This mortgage took preference of all subsequent claims. This was acquiesced in by the other creditors.

Next, as to admitting the complainant now to come in and participate with other creditors who proved before master Maison. See the order of reference of the twelfth of February, one thousand eight hundred and thirty-nine. He, as master, was to account for rents and profits since September, one thousand eight hundred and thirty-six. By the revised statutes the master was bound to advertise for creditors at least six weeks and the time expired on the thirteenth of May, one thousand eight hundred and thirty-nine. At that time the complainant's claims had been passed upon by master Clark and were *sub judice*. His was a claim against Jessy Ann Dyett which he could have produced before master Maison and it would have been received; not exactly liquidated, but nearly so. By his omission, he has precluded himself, especially after a decree, without application to be let in: *Thompson v. Brown*, 4 J. C. R. 619. The rule is that where a creditor is let in after a decree, he is not to disturb that decree: *Grey v. Somerville*, 1 Russ. & M. 339; Seton on Decrees, 56, and cases cited.

If he is now entitled to participate, the decree and all that has been done under it must stand. He cannot assert a priority of his mortgage nor claim over other creditors, because this would be disturbing the decree, which has not been and cannot now be opened. He can only come in *pari passu* with respect to the future rents and profits. There ought to be no reference to ascertain whether the complainant can have a preference over other creditors; nor can he, now, be allowed to impeach the debts of such creditors. The ac-

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counts have become stated and settled. If there are any errors therein, the complainant should have pointed them out by his bill. It is not clear to understand what is meant by a legal and equitable claim distinct from an equitable one or why the complainant's costs and fees stand on a better footing than any other debt, such as for coal or lumber provided for the estate.

But a good objection exists here in behalf of the infants against the complainant's demands, namely, the statute of limitations. It is never necessary for a guardian *ad litem* to plead or set up such a defence in an answer. Master Clark's report shows that a great part of the claim accrued prior to April, one thousand eight hundred and thirty-one. Mr. Warner was appointed a trustee on the third of November, one thousand eight hundred and thirty-one. His account was rendered to Hammersly's solicitors on the thirtieth of April, one thousand eight hundred and thirty-one. This account was assented to by the trustee and became the debt at that time. His right of action then accrued against Hammersly, who had employed him. He could have sued at law. The statute is a bar both at law and in equity. It was so before the present bill was filed. Mr. Hoffman also cited 10 Leigh's R. as to the necessity of making *cestuis que trust* parties.

Mr. Benjamin W. Bonney, for the guardian *ad litem* of the infants Dyett. This is an important suit for these infants; and involves the life or death of their estate. The complainant's present bill should have been a creditor's bill; Seton on Decrees, 52, 53. The only evidence in the cause is what is embraced by the old suits; and this evidence does not prove a claim against the infants. They were strangers to those proceedings and not affected by them. The trust deed secures them certain rights. This appears in the reported case in 7 Paige's R. The children are purchasers under the deed of trust; and do not take from father or mother. What is the issue by the pleadings in the cause? Why, whether, by force of the decree, the complainant can have satisfaction out of the capital of the estate. The decrees gave no such right. Nor is the prior bill any evidence

of facts to show such a right. It only shows Dyett and wife's estate in the premises and goes against that and nothing else. It shows he was employed by their trustees and has rendered them services. It does not appear that the children were not *in esse* at that time. The whole proceedings, then, only tend to establish the claim against Dyett and wife and her trust estate. The trustee cannot charge the trust estate for costs and counsel fees for his own services: *Moore v. Froud*, 3 Mylne & Craig, 45. If this is law, it excludes all charges which accrued after he became trustee.

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Mr. Warner, in reply. As to the scope of this bill. It is to have the benefit of a decree in a former suit. An original, not a supplemental bill. The complainant was a competitor creditor of the same estate or fund. The debt was established by the former decree; and it is based upon a claim equal in equity and right to any other debt. Other claims have obtained no preference, although the decree for them was first obtained. This was a mere casualty. There is but one trust estate in which husband, wife and children have separate interests. Separate trusts, though in but one estate and one trust qualified. The complainant is now told that he ought to have come in; but it is proved he was opposed and that the door was attempted to be shut against him. It is conceded by the opposite counsel that this complainant had a right to come in with other creditors. Those debts were of a special character, namely, for the benefit of Mrs. Dyett and on that ground were they recoverable in equity. It is denied that he had a right to come in with such other creditors. His claim is a broader one than those against Dyett and wife. It is conceded now and such is the law, that creditors may be let in at all times so long as the fund remains under the control of the court. Here the fund so remains, the property paying its rents quarterly. He is now entitled to come in and is not to be prejudiced by the decree as entered by consent nor by any thing since done under it. As to the complainant's claim, it was a legal claim, because it would bear a suit at law. He could have sued Hammersly—this is admitted. It was legal against Hammersly the trustee and equitable against Mrs. Dyett and

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the income belonging to her. The necessity for the complainant to file his first bill arose from the fact that he had become trustee and could not sue himself. Then, as regards the infants and their estate. This complainant will not yield to any one in sympathies for them. Hitting the bird in the eye belongs to sportsmen. Strict proof is called for here. The court already has it in the decree, which purports to be a decree directly against the trust estate. When the bill was filed there were no children, no such *cestuis que trust*, no trust estate then, except such as Mrs. Dyett held. The fee is in trustee as a legal estate. The children's equitable estate is contingent. A debt against the estate contracted by him is binding upon the whole of what he holds. The contest has always been between Joshua Dyett's liability and the trust estate, meaning the whole estate. There is but one such estate in this case to which the decree refers, although there are different or several interests in it. The children take nothing except in the event of surviving their parents. The account originated in services to protect the whole estate as one entire estate.

April 9,  
 1845.

THE VICE-CHANCELLOR:—It is one of the objects of the bill in this cause to have a debt of five thousand two hundred and seventy-two dollars and fourteen cents (decreed to the complainant in a former suit) charged upon the capital of the trust estate; and the payment thereof enforced by writ of execution or in some other way. Leave was granted to the complainant to file a bill for this among other purposes; and this bill has accordingly been so filed. But, I think the complainant has failed in establishing it as a debt against the *corpus* of the estate belonging to the children in remainder. The burthen was upon him to show affirmatively that the debt in question was contracted for the preservation of the inheritance or for its permanent improvement; and in the absence of such proof, the court can extend it no farther than to the interest which Dyett and wife had in this trust estate and which, since the insolvency of Dyett in one thousand eight hundred and twenty-seven, has belonged exclusively to his wife, being a life interest merely in her. In the original suit it was not attempted, on the

taking of the account, to carry the liability beyond their life estate. The order of reference to master Clark directed the taking of the account between the complainants and the estate of the defendants Dyett and wife in the hands of the complainant and Mr. Hoffman as their trustees; and the master's report found, accordingly, that so much was due to the complainant from the said trust estate of Dyett and wife. Now, to carry the liability beyond their present or immediate interest in the estate, something more than has as yet appeared must be shown. In the case of the *North American Coal Co. v. Dyett*, 7 Paige, 9, the chancellor took care to keep the life interest of Mrs. Dyett distinct from the remainder and to charge the former with the debts contracted as on account of her separate estate. This limit must be observed in the present case.

But it is objected, in behalf of other creditors whose debts are provided for in the decree made in the suit of the *North American Coal Company*, that the complainant ought not to be let in to disturb their order of payment or to participate with them in any immediate or accruing benefit from this trust estate; and that he is now to be postponed until they are all paid. This objection, in my opinion, cannot be allowed to prevail. It would work a manifest injustice to the complainant, who, for aught that appears, is as meritorious a creditor as any of them. If he had come in before master Maison under that decree his claim must have been admitted. And it is clear, both on principle and authority, that his neglect or omission does not preclude his right to be let in now, provided the other creditors are placed in no worse condition and subjected to no more additional expense than if he had come in before the master and proved his demand: *Pratt v. Rathbun*, 7 Paige, 269.

The decree which I must make, will, therefore, in the first place, declare and adjudge that the complainant's debt of five thousand two hundred and seventy-two dollars and fourteen cents, in the pleadings mentioned, is not a charge upon the fee or remainder of the trust estate limited to the children of the said Joshua Dyett and Jessey Ann his wife; and that the bill as to the said children be dismissed with costs to their guardian *ad litem* to be taxed and to be paid

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ment. And further, that the complainant and the adult defendants each bear their and his own costs respectively of this suit.

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A rehearing was had in this case ; and the following is the further opinion and decision of the court.

July 24,  
1845.

THE VICE-CHANCELLOR:—The property involved in this suit is the same which was in controversy in the case of the North American Coal Company above referred to ; and I need only refer to the report of that case in 7 Paige, for the purpose of showing what are the trusts. And the only additional facts having an intermediate connection with the trusts are that Mrs. Dyett has survived her husband and that there are several children of the marriage *in esse*, who are parties to this suit and are yet minors. The interest Mr. and Mrs. Dyett had in the property under the trust deed and which devolved upon her solely, by the happening of her husband's insolvency in one thousand eight hundred and twenty-seven and by his subsequent death and the interest which her children took or became entitled to from the time of their respective births, were separate and distinct interests or estates in the property. In the parents, an equitable estate for life ; in the children, a remainder in fee. Both capable of being charged with debts, separately contracted, on the credit or for the benefit of the one or the other or for both as the case might be. And hence it was that, in the case of the North American Coal Company, it was held that debts contracted on account of or for the benefit of Mrs. Dyett's equitable interest in the property, as a trust estate, were chargeable upon and were to be paid out of the rents and profits belonging to her and not out of the capital or fee belonging to the children. The complainant contends, however, that his is a debt of a higher character—that it originated in professional services rendered by him for the preservation of the inheritance, as well as for the protection of Mr. and Mrs. Dyett's interests as *cestuis que trust*—and, consequently, that he is entitled to a decree that shall reach the inheritance or fee of the property and subject it to a sale for his benefit—such is one

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object of his bill in this cause. The answers deny his right to such a decree; and so far, as facts are alleged, as entitling him to it, they are put in issue. And, yet, no witness has been examined on that branch of the case. He relies altogether upon the proceedings, orders and decrees in two former suits in this court for the evidence to sustain his claim to such relief; and insists that it appears to be a matter already adjudicated in his favor. He is met, however, with the objection that the proceedings and decrees in those suits can have no effect upon the rights of the infants who were not parties to them; and I do not see how any thing that has heretofore been said or done, even though it should seem to have a direct bearing upon their rights of property, can be allowed to affect them. They have had no opportunity, until they were brought before the court in the present suit, to be heard or to have their rights properly attended to; and they now deny that the indebtedness was contracted for their benefit or for the preservation of their estate. The burthen of proof is thrown on the complainant. He is bound to show the debt was contracted. It is matter of evidence; and the proceedings in other suits, though of record, are not that sort of evidence which the court is bound to require in a case of such vital importance to the interests of these infant children. But, taking the pleadings, proofs, master's reports and decrees in the former suits as we find them and admitting them as evidence (for they have been read and referred to as such in this cause) and what facts do they establish as being necessary to the complainant's case against these infants? I do not understand them as proving that he was employed for the protection of the infants' estate in the property and that the services he rendered were on their account as beneficiaries under the trust or as owners of the fee. Wherever the words *trust estate* or *trust property* or words of like general import are used in the various proceedings alluded to, they must be regarded as used solely with reference to the trust as it existed in favor of Dyett and wife and to the interest or estate which they had in the property, because there was no other or greater interest in the property than such as they were entitled to necessarily or properly in-

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volved in the litigation then going on. There were no parties to the suits as defendants other than Dyett and wife and their trustees. And the chancellor, necessarily, said in the case of the North American Coal Company that, if there were any creditors whose debts were chargeable upon the trust property generally, capital as well as income, they should make their claim by a distinct bill and to such a bill the children of Mrs. Dyett should be made parties. Hence, in their absence and upon a bill not filed for that purpose, the question of so extended a liability could not properly arise or be considered, much less be adjudicated. That it was not considered or passed upon in the suit in this court of the present complainant against Dyett and wife and Mr. Hoffman, as trustee, instituted for the purpose of taking an account of the complainant's demands and of having the amount due to him ascertained and determined, is manifest from the final decree made in that cause on the eighth day of April one thousand eight hundred and forty-one; for it is there, expressly, provided, among other things, that the complainant should be at liberty to file a bill as he might be advised for the purpose of making his debt (ascertained to be five thousand two hundred and seventy-two dollars and fourteen cents) and his costs of suit a charge upon the capital of the trust estate and to have payment and satisfaction out of the same by writ of execution or otherwise. Thus showing that his debt had not, yet, become a charge and was not to be so made by that decree, Pursuant to the leave thus granted, the present bill has been filed, but the complainant has entirely failed, in my judgment, to support, by proper and sufficient evidence, this particular object of his bill. It is made a point, on this rehearing, that if the complainant has placed undue reliance on the proceedings in the former causes, as *prima facie* evidence to make out his case, he ought now to be permitted to correct the mistake and to be allowed still to take proofs. I know not how this can be done without departing from all rule in the practice and proceedings of this court. There is nothing shown to warrant me in adopting the suggestion within any of the principles on which the court acts in allowing causes to stand over, (as

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in *Cox v. Allingham*, Jacob's Rep. 337,) to enable a party to supply some unforeseen and unexpected defect in his testimony or to produce some newly discovered evidence.

Again, it is asked that the court institute an inquiry before a master, as to the character of the complainant's services and how far they contributed to preserve and benefit the inheritance, so that a portion, at least, of the debt may be charged thereon. But, the answer to this is, that the complainant has not shown, by any legal or competent evidence, that any part of his debt accrued for such service; and without some proof to that effect, in the first instance, there is no foundation on which to institute an inquiry with a view to an apportionment between the life interest of the mother and the fee of the children.

Upon the whole, it appears to me that I can make no decree more favorable to the complainant than the decree which I directed at the conclusion of my opinion of the ninth of April one thousand eight hundred and forty-five.

Let that decree be drawn up and entered.

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In the matter of EDWARD B. LEEFE and CAROLINE M.  
his wife.

A grantor gave a leasehold house to a trustee, to receive rents and apply them towards the support of H. C. "And after the death of H. C., I give, grant and convey the aforesaid house to my natural daughter M. B. M. her heirs and assigns": Here the daughter got a vested remainder assignable and descendable; and on her making a marriage settlement (her future husband joining) whereby the property was secured to the survivor of them and the husband survived: *Held*, that he was entitled under the settlement and was not left to his marital rights.

Husband's rights in a wife's property stated by the court.

*It would seem*, that the provision requiring aliens to take incipient measures and to file affidavit before holding lands (1 R. S. 720) does not abolish the common law right of an alien to take by purchase.

The government alone can take advantage of an alien's disability to hold lands.

An officer of the court who, under its decree, holds a suitor's property by conveyance, has no right thereunder to raise objections to the suitor's title; and, therefore, has no business with a question of his alienism.

THIS case will be best understood from the petition of Edward B. Leefe and Caroline M. his wife, which was presented to the chancellor and referred by his order to the vice-chancellor to be heard.

The petition stated, that, as they were informed and believed, one Thomas Marston, late of the city of New York but now deceased, being possessed of an unexpired term of fifty years in the premises hereinafter mentioned by virtue of a certain indenture of lease made to him by the vestry of the episcopal church of St. Peters in Westchester county, state of New York, did, on the twenty-sixth day of February 1811, execute and deliver a certain indenture purporting to convey the same in the words and figures following, viz:—

"Know all men by these presents that I, Thomas Marston, for considerations me moving, have given, granted and confirmed and by these presents do give, grant and confirm unto Francis B. Winthrop my house now building the corner of Reade and Chapel streets in the city of New York, free from all ground rent that is now due or hereafter may be-

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*Estate.  
Remain-  
der.  
Leasehold.  
Husband  
and wife.  
Alien.  
Officer of  
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come due upon said premises during said term for which I hold the same, to receive the rents issues and profits thereof and every part thereof to be applied by him for the support and maintenance of Mrs. Hannah Currie for and during her natural life, upon the express condition that the same shall not be sold during the natural life of the said Hannah Currie but shall be held for the purposes aforesaid: and after the death of the said Hannah Currie I give grant and convey the aforesaid house the corner of Reade and Chapel streets to my natural daughter Mary Bunn Marston her heirs and assigns. And I do hereby give to the said Mrs. Hannah Currie so much of my furniture and household goods as is now in my house as she shall think sufficient towards furnishing a house in a genteel style. And as to all the residue and remainder of my said furniture and household goods I do hereby convey and give to my said natural daughter Mary Bunn Marston. In witness whereof I have hereunto set my hand and seal this 26th day of February 1811.

"THOMAS MARSTON. [L. S.]

"Sealed and delivered in the presence of

"ELSIE YOUNG,

"PHILIP BRASHER."

That the said Thomas Marston died on or about the 11th day of January 1814, and that the said Francis Bayard Winthrop having declined acting as trustee under said deed a bill of complaint was duly filed in this honorable court on the 7th day of March 1814 by William Bunn and Hannah Currie wife of John Currie by the said William Bunn her next friend and Mary Bunn Marston the natural daughter of Thomas Marston late of the city of New York then deceased—an infant under the age of twenty-one years also by the said William Bunn her next friend against Francis Bayard Winthrop, Charles W. Taylor and Cornelia his wife, John S. Winthrop, Francis Bayard Winthrop Junior, Henry M. Bearse and Charlotte his wife, Philip Brasher and Cornelia his wife, Elsie Young, Jacob R. Vanderveer and Cornelia his wife, Ann Marston Shaw, John Currie and William Bayard, which said bill charges, among other things, that Mary Bunn Marston is the natural child of the said Thomas Marston and was then still an infant—that Hannah Currie

for about eighteen years previous to the death of the said Thomas Marston resided in his house and took charge and management of his family and domestic concerns, he being far advanced in years exceeding the age of seventy-four years; that induced as well by the sense of gratitude for the long and faithful services of the said Hannah Currie who had devoted so long a portion of the best years of her life to his service and was wholly destitute of property as also by a sense of the moral obligation he was under to provide for the maintenance of the said Mary Bunn Marston, who was entirely dependant upon his bounty for the means of maintenance, the said Thomas Marston repeatedly and uniformly declared his intention to make for them respectively a competent provision which should place them beyond the reach of want. That in conformity with and in order to carry into effect these views and intentions the said Thomas Marston, on or about the 26th day of February 1811, made and executed the said instrument in writing hereinbefore and in said bill of complaint set forth—that the said instrument in writing was duly signed, sealed and delivered by the said Thomas Marston in the presence of Elsie Young and Philip Brasher who subscribed the same as witnesses thereto and that after the execution thereof in manner aforesaid the same was enclosed by him in and with his last will and testament under the same envelope, in which situation it continued and remained until after the death of the said Thomas Marston; and on the opening of the said last will and testament was found enclosed by the said Francis Bayard Winthrop the executor aforesaid by whom the same was delivered to the said Hannah Currie. That the said Thomas Marston departed this life on or about the eleventh day of January 1814 leaving a last will and testament and the said instrument in writing in the said bill of complaint and hereinbefore set forth in full force and virtue unrevoked, unrecalled and unaltered, except as in the said bill is stated; that since his death, Francis Bayard Winthrop, one of the executors, had taken upon himself the burthen of the execution of the said last will and testament in the said bill of complaint set forth; that the said Francis Bayard Winthrop, the trustee named in the said instrument bearing date the 26th day of Febru-

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ary 1811, would not accept the trust therein contained or take upon himself the burthen of the execution thereof. The said bill of complaint prayed, among other things, that the said Francis Bayard Winthrop might be decreed forthwith to elect definitively either to accept or decline the execution of such trust, and in case he should decline, that the said court, through one of its officers or by some other person or persons, would cause such trust to be executed and that the said Francis Bayard Winthrop in case he should decline to execute such trust should bring into court or deliver to such person or persons as the court should appoint the deed or indenture of demise of the said term of years mentioned in the said instrument and all other muniments or papers touching the same; and that the said Francis Bayard Winthrop or he and the other legatees and devisees under the said will of the said Thomas Marston or some of them might be decreed to pay and keep down the ground rent as the same should, from time to time, become due and payable pursuant to the provisions and reservations contained in the said demise; and that the said court would be pleased to decree and adjudge valid and confirm the said instrument executed by the said Thomas Marston bearing date the twenty-sixth day of February 1811 in the said bill of complaint recited either as a grant or conveyance or else as a testamentary disposition in the nature of a codicil to the said last will and testament of the said Thomas Marston or else adjudge and decree in what way the same was to be deemed to operate and enure and what estate and rights were conveyed passed or vested thereby. And that the said John Currie should be decreed to suffer and permit the said Hannah Currie to enjoy and dispose of the said property and the rents, issues and profits thereof free from any control, interruption or molestation on his part.

And further that, as they were informed and believed, answers were duly put in to said bill of complaint by the several defendants therein mentioned and a final decree was then duly made and enrolled in the words and figures following, that is to say :

" At a court of chancery held for the state of New York  
at the city of Albany the sixteenth day of January,  
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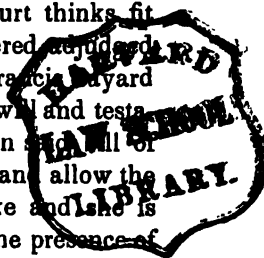
*Present*—The Honorable James Kent, Esquire, Chan-  
cellor.

William Bunn, Hannah Currie wife of John Currie by the  
said William Bunn her next friend and Mary Bunn Mar-  
ston, an infant, by the said William Bunn her next friend,

*vs.*

Francis Bayard Winthrop, William Bayard, Charles W.  
Taylor and Cornelia his wife, John Hill Winthrop, Francis  
Bayard Winthrop Junior, Henry M. Barse and Charlotte  
his wife, Philip Brasher and Cornelia his wife, Elsie Young,  
Jacob R. Vanderveer and Cornelia his wife, Ann Marston  
Shaw and John Currie.

This cause, by the consent of the parties having been sub-  
mitted to his honor the chancellor upon bill and answer and  
a case agreed upon and signed by the solicitors for the re-  
spective parties containing certain admissions, whereupon  
and upon debate of the matter and hearing what could be  
alleged by the counsel for both parties this court thinks fit  
and so order and decree; accordingly it is ordered, adjudged  
and decreed by the court that the defendant Francis Bayard  
Winthrop, the sole acting executor of the last will and testa-  
ment of Thomas Marston, deceased, named in said bill of  
complaint of the said complainants, do permit and allow the  
complainant, Hannah Currie, to elect and take and she is  
hereby declared entitled to elect and take, in the presence of  
one of the masters of this court, such portion of the furniture  
and household goods (the plate being included) possessed  
by the said Thomas Marston on the twenty-sixth day of  
February in the year of our Lord one thousand eight hun-  
dred and eleven as she shall, with the approbation of such  
master, deem sufficient towards furnishing a house in a gen-  
teel style, due regard being had to her circumstances and de-  
gree in life—and that upon such election being made and  
approved by said master in writing the said Francis Bayard  
Winthrop do forthwith deliver to the said Hannah Currie  
or her assigns the said portion of the said household furni-  
ture (plate being included) so elected by her and do deliver



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"over the residue of the said furniture and household goods (plate being included) to the guardian of the complainant Mary Bunn Marston to be kept and preserved for her use; and that—for the purpose of making the election aforesaid—the said Francis Bayard Winthrop do show the said furniture and household goods (plate included) at such reasonable times and places as the said master shall for that purpose appoint.

And it is hereby ordered, adjudged and decreed that the said Francis Bayard Winthrop do, within ten days after service of a copy of this decree, bring into this court and deposit with the assistant register thereof in the city of New York the lease of the lot of ground at corner of Reade and Chapel streets in the city of New York, alluded to in the deed executed by Thomas Marston, bearing date the twenty-sixth day of February one thousand eight hundred and eleven, set forth in the complainant's bill of complaint and all other muniments and papers if any relating thereto in his power or possession by whomsoever the same may be executed and whatsoever may be the description of the said premises; and do execute and deliver to the said assistant register some proper release and assignment of all his right and interest in the said house and lot of ground, to be prepared under the direction of one of the masters of this court, to be held by the said assistant register and his successors in office to the uses and upon the trusts contained in the said deed executed by the said Thomas Marston bearing date the twenty-sixth day of February one thousand eight hundred and eleven.

And it is further ordered, adjudged and decreed that so much of the estate of the said Thomas Marston, at the time of his death, as shall be necessary for that purpose, stand and be charged with the payment of all the ground-rent due or to become due during the continuance of the said demise and remain and continue in the hands of the said Francis Bayard Winthrop, acting as executor as aforesaid of the said Thomas Marston deceased and those who may legally succeed to the administration of the said real estate; and that the said Francis Bayard Winthrop and his legal representatives in the administration of the said estate do pay off and keep down as well such ground rent as is now in arrear

as also such as shall hereafter become due and payable during the continuance of the said demise.

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The petition further showed that the said Francis B. Winthrop, intending to obey said decree, executed a certain indenture in the words following, viz: "This indenture made the third day of March in the year of our Lord one thousand eight hundred and fifteen. Between Francis B. Winthrop, executor of the last will and testament of Thomas Marston, late of the city of New York, gentleman, deceased, of the first part and Isaac L. Kip, assistant register of the court of chancery, of the second part. Whereas the said Thomas Marston in his lifetime and at the time of his death, being possessed of a certain leasehold estate of and in a certain dwelling house and lot of ground situate, lying and being in the first ward of the city of New York at the corner of Reade and Chapel streets, did, in and by a certain instrument or deed poll bearing date the twenty-sixth day of February in the year of our Lord one thousand eight hundred and eleven, give, grant and confirm the said dwelling house and lot of ground to the said party to these presents of the first part, for the remainder of the term for which the said Thomas Marston held the same, in trust to receive and apply the rents and profits thereof to the support and maintenance of Hannah Currie during her natural life, and after her decease to convey the said house and lot to his natural daughter the said Mary Bunn Marston. And whereas the said party of the first part having refused to execute the said trust, the said Hannah Currie (she being a feme covert) and the said Mary Bunn Marston (she being an infant under the age of twenty-one years) by their next friend William Bunn filed their bill in the court of chancery for the purpose of obtaining the effect of the said instrument; and such proceedings were thereupon had that on the sixteenth day of January eighteen hundred and fifteen, it was adjudged and decreed, among other things by this court, that the said party of the first part should execute and deliver to the said assistant register some proper release and assignment of all his right and interest in the said house and lot of ground, to be prepared under the direction of one of the masters of the said court—to be held by the said assistant register and his suc-

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cessors in office to the uses and upon the trusts contained in the said deed poll. Now, therefore, this indenture witnesseth that the said party of the first part, in obedience to the said decree and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, at or before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, hath assigned, remised, released and forever quit-claimed, and by these presents doth assign, remise, release and forever quit-claim unto the said party of the second part and his successors in office, all his the said party of the first part's right, title, and interest of in and to the said dwelling house and lot of ground, with the appurtenances. To have and to hold to the said party of the second part and his successors in office to the uses and upon the trusts declared in and by the said deed poll. In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written. Signed,

FRANCIS BAYARD WINTHROP. [L. s.]

Executor to the estate of Thomas Marston dec'd.

Sealed and delivered in presence of

JOHN S. WINTHROP.

The petition further showed that Mary Bunn Marston above mentioned, in the month of November 1827, intermarried with Augustus Krucher of the city of Paris, and died in Paris without issue some time in the winter of 1828 leaving her said husband her surviving. That said Krucher being a French subject, said intermarriage was celebrated before the consul-general of France in the city of New York, according to and under the provisions of the code civil of France, and that prior thereto an ante-nuptial contract was duly executed between them and is now duly registered in the chancery of said consulate in the city of New York. That by the provisions of said marriage settlement all the property, real and personal, of the said Mary, the wife of the said Augustus, became vested in him absolutely on her death as survivor. The petition further alleged that under the said deed or indenture of the said Thomas Marston the interest of the said Mary Bunn Marston was fully vested in her on the execution of said deed—the enjoyment only being post-

poned until the death of the said Hannah Currie and that upon the decease of the said Mary her title fully survived to her said husband the said Augustus Krucher and became perfect in him after the decease of the said Hannah. That the said Hannah Currie died in the month of January 1841.

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The petition further showed that on the 8th June 1842, the said Augustus Krucher, being a man of wealth and desirous that the property of his said wife should go to some one of her own relations, conveyed the said unexpired term to the petitioner, the above named Caroline, a cousin of the said Mary Bunn Marston, by a deed or indenture of that date, now in the possession of the petitioners and ready to be produced, as this honorable court might direct. The petitioner, therefore, insisted that, by reason of the premises, they were entitled to a conveyance of said premises from the said Hiram Walworth.

They further showed that at the time of the decease of the said Hannah Currie, who being the aunt of the petitioner the said Caroline and for a long time before, the petitioner and her mother Matilda Nicoll, the sister of the said Hannah Currie, were in the occupancy of the said premises and the said Hiram Walworth shortly thereafter commenced an action of ejectment against them without the authority of this court, as they were informed and believed, and upon the strength of the strict legal title in him under the proceedings aforesaid, had ejected them from the said premises: the superior court, before which court said suit was pending, having decided in his favor on that ground alone. The petition further showed that since the said decision they had requested the said Hiram Walworth to make a proper conveyance of said premises to the petitioners and to surrender the possession thereof to them as the rightful proprietors which he had refused and still refuses to do.

The petition, therefore, prayed that the said Hiram Walworth, the said assistant register, might be directed to make proper conveyance of the said premises and the said unexpired term to the petitioners or to the petitioner, the said Caroline, in such form as the law might require and to account with the petitioners for all rents and profits of said premises received by him since the death of the said Han-

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nah Currie or for such other order in the premises for the promotion of justice and the preservation of the rights of the petitioners as might seem meet.

This petition was referred to a master to inquire and report as to the truth of statements and whether the petitioners were entitled to such transfer and conveyance as was prayed for; and the master was to give notice of his proceedings to Hiram Walworth, Esquire, the assistant register.

The case now came before the court on the petition and master's report, the latter embracing testimony which sustained the allegations and facts set forth in the former.

Mr. *Anthon*, for the petitioners, argued from the following points:

1. The conveyance from Thomas Marston to his daughter Mary Bunn Marston, of the unexpired term of years in the leasehold premises in question, to commence at the time of Hannah Currie's death, was a good lease to her *in futuro*: 4 Com. Dig. 86, a. g. and notes.

2. She had in her immediately *interesse termini* and had full and perfect right to grant it to another. *Ib.* p. 96, c. 14.

3. By the 8th article of the marriage contract between L. A. Krucher and Miss Marston, it is expressly agreed that by a *donatio inter vivos*, the survivor shall take all the property moveable and immoveable which may belong to the deceased on the day of his or her death. Mr. Krucher then became possessed of all the right of his wife in the chattel interest in question by survivorship.

4. L. A. Krucher, after the death of his wife, by indenture dated 8th June 1842, conveyed said unexpired term to Caroline Matilda Green, the wife of the petitioner Edw. B. Leefe. And she had entered and taken full possession of the premises and is the proper owner thereof.

5. Krucher was a citizen at the time of the marriage or at the time the title to the unexpired term vested in him and had, therefore, full power to convey: *Nolle v. Fenwick*, 4 Rand. 588. Facts and circumstances after long interval good proof of naturalization.

6. With regard to the acquisition of leasehold premises, it is of no moment whether the party acquiring the same is citi-

zen or alien; the right equally vests and is accompanied with full power to convey, until office found. The title of an alien friend to land purchased, is good against every body but the state; and his right can only be divested by office found: *McCreary v. Allender*, 4 Harris & McHenry, 409; *Ib.* 411; *Craig v. Leslie*, 3 Wheat. 589; *Jackson v. Adams*, 7 Wend. 367. And until the land is seized by the state, the alien has full dominion over it and may convey it to a purchaser or maintain an action to recover it: *Bradstreet v. Supervisors*, 9 C. 13 Wend. 546; *Scalan v. Wright*, 13 Pick. 523.

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7. The petitioners are, therefore, in every point of view, clearly entitled to a conveyance of the premises from the trustee, conceding such conveyance to be necessary for their title.

Mr. *M. Hoffman*, for the assistant register.

THE VICE-CHANCELLOR:—Although the legal title to the leasehold property in question is vested in the assistant register *ex officio*, yet, he can claim no beneficial interest or ownership in the property for himself. He is merely a trustee; and during the life of Mrs. Currie she was *cestui que use* and enjoyed the property. At her death, it would have gone to Mary Bunn Marston, had she lived; and the assistant register must have conveyed it to her absolutely and, thus, would have terminated the trust. Mary Bunn Marston had married, however, and died before her mother, Mrs. Currie, leaving no issue, but leaving her husband surviving.

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To whom, then, did the property belong? Did the gift lapse or fail for want of a person to take or did her surviving husband become entitled to the property?

The remainder in the term or lease, after the life estate for Mrs. Currie was carved out of it, was clearly a vested remainder, vested in interest, although not in possession. As such, it was assignable, transmissible, descendible. The trust did not cover the gift to the daughter. By the original Marston deed, the gift was directly to her—not to a trustee for her. The language of the instrument is: “after the



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death of Hannah Currie, I give, grant and convey the house, &c. to my natural daughter Mary Bunn Marston, her heirs and assigns." This was a gift *in presenti* and vested her with the title and estate at the same time that the gift to the mother took effect, although it was not to be enjoyed as a thing in possession of the daughter until the death of the mother : on this subject see 1 Roper on Legacies, 392, 394 and cases there cited.

If the daughter—dying, as she did, in the year one thousand eight hundred and eighteen—had died unmarried, it is certain that the property, being a chattel interest, would have gone to her personal representative, subject, of course, to her mother's use of it for life. But, having married, it is equally certain that the law gave it to her husband, unless, by the contract of marriage, the husband deprived himself of his marital right or, by being an alien, was prevented from taking. The ante-nuptial contract which, it appears, the parties entered into, could not deprive him of the property, except in the event of her surviving him, when it was still to have been her estate ; but, in the event which has happened, it became his property absolutely by survivorship. True, a husband, by marriage, acquires only a qualified right or interest in the outstanding personal property of his wife. If he does not reduce it into possession during her lifetime, he may be obliged to take out letters of administration as upon her estate, in order to recover it ; but when so recovered, the property will belong to him, subject to the payment of any debts of the wife contracted *dum sola*. And if he omits to administer and dies without obtaining the possession, then, the property will go to the wife's and not to the husband's representative and next of kin : Williams on Executors, 438, 439.

I am of opinion, however, that the right of property in this case, as between this husband and wife, is governed by the ante-nuptial contract made between them and not by the rules of the common law. They have regulated the devolution, as they were at liberty to do, by contract ; and have not left the husband to stand upon his strict legal marital right. According to the contract, the husband became entitled by survivorship. All her right, by that event,

passed to him by force of the contract and not by operation of law resulting merely from the marriage.

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But, it is said, the husband was an alien and could not take and hold an interest in lands. The evidence fails to prove that he was ever naturalized, although he took an incipient step towards becoming a citizen. At common law, however, an alien may take real estate by purchase—not by descent or mere operation of law—and hold the same against every body, except the state; and if dispossessed or dispossessed by any other than the government, he may maintain his action or writ of right: *Bradstreet v. Supervisors of Oneida*, 13 Wend. R. 546. There is one exception to an alien's taking by purchase, i. e. he cannot take by devise (a species of purchase) and which is now prohibited by statute: 2 R. S. 57, § 4. I find no other statutory prohibition to an alien's taking by purchase, unless, indeed, the proviso introduced into the act of 1825, enabling resident aliens to take and hold lands, provided they do certain things, was intended to prevent any alien from taking by conveyance as well as by descent or devise. That proviso is incorporated into the revised statutes, 1 R. S. 820, § 15, 16, 17 and the proviso alluded to forms § 17. It seems to me that the legislature could, hardly, have intended to abolish entirely the common law right to take by purchase—by inserting these provisions—or it would have been more clearly expressed.

But, suppose the § 17 produces a disqualification to take as well as to hold lands, unless the alien becomes a resident and files an affidavit of his intention always to reside in the United States and to become a citizen thereof. Who can take advantage of the disability so as to divest the alien or his grantee of the possession acquired under his purchase? Most certainly none but the government. It is an affair of the government alone. A grant to an alien is good against the grantor and his heirs. So is a devise good against the heir of the deviser. The title passes out of the grantor or deviser by his own act; but, instead of vesting in the alien grantee or devisee absolutely, it reverts *ex instanti* to the state by escheat. This seems to be the

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doctrine recognized by our supreme court in the recent case of *The People v. Conklin*, 2 Hill's R. 67.

It follows, from this view of the subject, that the assistant register of this court can have no right to interfere with or to question the title which was acquired by the husband of Mary Bunn Marston by purchase—for such it was—under their marriage contract, much less to disturb the possession of him and his grantee the present petitioner. Upon what ground, even at law, he could have been allowed to recover judgment in the action of ejectment spoken of in the petition, I am not informed. In equity he can have no such right. If the petitioners have not a valid title under the deed from the surviving husband of Mary Bunn Marston, by reason of his alienism, it is not for the officer of this court to interpose the objection and seek to dispossess them. The attorney-general is the person to act in behalf of the state; and the petitioners can only be called upon to defend their title and possession against the claim of the government. In the meantime, this court is bound to order the assistant register to desist from further proceedings against the property and to execute a release, if necessary, to quiet them in the possession against any claims he may suppose himself to have.

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CRANE  
v.  
O'CONNOR.

CRANE v. O'CONNOR.

Judgments do not attach to leasehold premises unless where there is possession in the lessee (judgment debtor.)

Judgments are not liens in a case where a party has a lease but not the present possession and parts with the lease before the time arrives for him to enter upon the possession.

A LEASE was dated on the twenty-first day of November, one thousand eight hundred and thirty-nine; but possession under it was not to commence until the first day of May thereafter, (one thousand eight hundred and forty.) It was made in favor of Michael O'Connor for the term of twenty-one years. Prior to his getting it, judgments had been docketed against him; but, before he went into possession, he assigned the lease to the defendant Joseph O'Connor.

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Lien.  
Judgment.  
Leasehold  
premises.  
Possession.

The latter, under the direction of the court, had assigned it to the receiver in the present suit; the court ordered a sale of such lease; and it had been purchased by Selim Franklin, whose counsel objected to the title. The receiver asked for directions; and the question was, whether the judgments against Michael O'Connor were liens upon the leasehold premises?

Mr. *E. Ward*, for the receiver.

Mr. *Campbell*, for the purchaser.

THE VICE-CHANCELLOR :—I am of opinion that the judgments against Michael O'Connor did not become liens upon the leasehold property; and that the purchaser from the receiver in this cause will get a title free from any claims which the judgment creditors of Michael O'Connor may attempt to set up. Until entry and possession under the lease, Michael O'Connor had not such an interest or estate as could be bound by judgment. He had an interest which was assignable, but which, however, was a mere interest vesting in contract, an *interesse termini* and not an estate

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 v.
 PIRNIE.

in lands: Chambers' Landlord and Tenant, 474, 475. Possession, under the lease, was essential to the vesting of an estate so as to be bound by a judgment: *Jackson v. Parker*, 9 Cowen's R. 73. This was so at common law; and by our statute of uses, 1 R. S. 727, § 47, a party must have or be entitled to the actual present possession or he cannot be deemed to have a legal estate in lands. Michael O'Connor parted with the lease before the time arrived for his taking possession under it. He never had possession of the premises; nor did he become entitled to the actual possession. So that he acquired no estate in the lands which could be affected by a judgment against him. The existence of the judgments against Michael O'Connor forms no objection to the title.

ASPINWALL, administrator, &c. v. PIRNIE and others,
 executors, &c.

The R. S. which require an executor to elect between a legacy given for services and compensation allowed by statute, do not act retrospectively; and an executor under a will proved before 1830, is entitled to both.

April 23,
 1844.

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*Executors.*  
*Compensation.*  
*Legacy.*  
*Election.*

A TESTATOR, James Murray, who died on the thirteenth of February, in the year one thousand eight hundred and twenty-eight, had bequeathed to an executor three hundred dollars for care and trouble. The question was, whether such executor could also take commissions? THE VICE-CHANCELLOR decided, that the executor, in this case, was entitled to both legacy and commissions, inasmuch as the will took effect before the revised statutes which require an executor to make his election: 2 R. S. 93, § 59. The revised statutes not operating retrospectively in this matter.

Mr. M. Hoffman, for complainant.

Mr. Gerard and Mr. Platt, for the executor.

1844.

HODGKINSON  
v.  
THE LONG IS-  
LAND R. R. CO.

HODGKINSON v. THE LONG ISLAND RAIL ROAD COM-  
PANY.(a.)

Preliminary injunction refused to stop a Rail Road Company from complet-  
ing a tunnel through a city authorized by the civil authorities of the place  
—on an allegation of nuisance by an owner of adjoining property on the  
same line.

MOTION on the filing of a bill for an injunction to restrain  
the Long Island Rail Road Company from constructing a  
tunnel through Atlantic street in the city of Brooklyn; and  
from running cars there when completed. The bill was  
filed by a party owning property on Atlantic street; and  
was founded on the idea of nuisance, and prayed a perpet-  
ual injunction. Affidavits were annexed to it. These and  
the bill disclosed the fact that the tunnel had progressed  
before the bill was filed; while, by the affidavits read in op-  
position to the motion, it appeared that it was almost com-  
pleted.

May 20,  
1844.

Injunction.  
Nuisance.

The Common Council of Brooklyn had consented to the  
making of the tunnel.

Mr. A. Mann, Jr., and Mr. William Silliman, in support  
of the motion.

Mr. Clarke, contra.

THE VICE-CHANCELLOR:—Held, that the court of chan-  
cery had not jurisdiction to restrain the construction of this  
great work or the use of it, when completed. That it was  
a matter of municipal regulation and the corporation of  
Brooklyn having granted to the defendants the privilege of  
constructing the tunnel for the purposes of their road, this  
court would not inquire whether the municipal authorities

(a) Affirmed by the Chancellor on appeal, 6th April, 1847.

1844.

POST  
v.  
DORR.

of Brooklyn, in making such a grant, had exceeded their powers or not. It was a matter triable at law and the parties aggrieved must be left to their legal remedy.

Motion denied, with costs.

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POST and others v. DORR and others.

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Where an injunction is granted and a receiver is appointed and no motion is made to dissolve the one or to get rid of the latter, an objection raised at an after-period of the cause against either, as having been improperly allowed, will not be regarded.

The order allowing a receiver which is not modified or discharged becomes the law of the case as to the right to have one; and the application of the funds in his hands necessarily follows through him.

A mortgagee obtains a specific lien upon rents, by diligently obtaining the appointment of a receiver; and a second or third mortgagee may, thus, get an advantage of the first mortgagee as to rents collected.

May 28,  
1844.

*Practice.  
Receiver.  
Mortga-  
gor and  
Mortga-  
gee.  
Injunc-  
tion.*

MORTGAGE case; and where a receiver was appointed to take the rents and profits of the mortgaged premises, on account of the insolvency and subsequent bankruptcy of the mortgagor. As, after a sale, the amount was insufficient to satisfy the sum due to the complainants, they now presented a petition that the receiver should pass his accounts and pay over the money in his hands to them, in order to make up the deficiency.

When the bill was filed, an injunction was allowed against the mortgagor (then applying in bankruptcy) and against the general assignee in bankruptcy; and, on a supplemental bill, a receiver had been appointed, although opposed by counsel for the general assignee.

The mortgagor's rights (whatever they might be) in the mortgaged premises, had been sold by such general assignee.

The question was, as to whom the rents in the hands of the receiver should go: the mortgagee claiming to receive them and both the general assignee and the buyer from

him of the mortgagor's rights in the premises respectively also claiming them?

1844.

*Mr. Evarts and Mr. J. P. Hall*, for the complainants.

POST  
V.  
DORR.

*Mr. Western*, for the buyer of the mortgagor's rights.

*Mr. Bonney and Mr. Wood*, for the general assignee in bankruptcy.

THE VICE-CHANCELLOR :—It is too late to raise an objection against the granting of the injunction and an appointment of a receiver of the rents. If any well founded objection existed to either, it should have been made on motion to dissolve the injunction or in opposition to the receivership at the time it was applied for. Submitting to the appointment of a receiver by those who were before the court and had a right to object and who could have appealed from the order, if dissatisfied with it, but did not, is such an acquiescence in the order as renders it the law of the case with respect to the right to have a receiver; and that right being established, the application of the funds must follow so as to accomplish the object intended. Thus, in the case in hand: the original bill of these complainants was deemed sufficient to entitle them to a preliminary injunction, restraining the mortgagor, *Dorr*, and his assignee in bankruptcy, from collecting the rents of the mortgaged premises then about to become due and those subsequently to accrue; and on the filing of the supplemental bill in the cause, it was also deemed a proper case for the appointment of a receiver to take and collect the rents; and an order (the order of the twenty-third day of May one thousand eight hundred and forty-three) was made accordingly. All this proceeded on the ground of the mortgagor's bankruptcy and an apprehended deficiency from a sale of the property to satisfy the mortgage debt. It was with a view to provide against such deficiency that the rents were intercepted and placed in the hands of a receiver. The mortgagor and the general assignee in bankruptcy, in whom the equity of redemption or, in other words, the legal estate had become vested, were parties to the suit; and they are

May 14,  
1845.



1844.

POST  
v.  
DORR.

bound by the provisions of the order of the twenty-third day of May one thousand eight hundred and forty-three. It is, indeed, there provided that nothing therein contained shall prejudice any right which Mr. T. Waddell the general assignee, may have to apply to this court on proper notice for liberty to come into possession of the rents on discharging the several sums due and payable to the complainants and defendants, mortgagees, and on such other terms as to the court shall seem equitable in the premises. This part of the order is a virtual recognition of the right of the mortgagees to have the rents applied as far as may be necessary towards the payment of the mortgage debt; and such was the object of the court in appointing a receiver. The apprehension of a deficiency from a sale under the decree and the inability of the mortgagor to make it good, which was the foundation of the receivership, have been realized; and it follows, as a consequence, that the rents must be applied towards such deficiency.

It appears to be an established rule, that a second or third mortgagee, who succeeds in getting a receiver appointed, becomes thereby entitled to the rents collected during the appointment, although a prior mortgagee steps in and obtains a receivership in his behalf and fails to obtain enough out of the property to pay his debt. This is on the principle that a mortgagee acquires a specific lien upon the rents by obtaining the appointment of a receiver of them; and if he be a second or a third incumbrancer, the court will give him the benefit of his superior diligence over his senior in respect to the rents which accrued during the time that the elder mortgagee took no measures to have the receivership extend to his suit and for his benefit: *Howell v. Ripley*, 10 Paige's C. R. 43. The same principle is found in *Thomas v. Brigstocke*, 4 Russ. 64. There, a mortgagee was held not to be entitled to rents collected and brought into court by a receiver appointed in another suit, which rents had accrued intermediate the time of the receiver's appointment and his discharge on the application of the mortgagee, although but for the receivership the mortgagee would have been entitled to the rents from the tenants. Notwithstanding the right of entry of a mortgagee has been abolished by our revised stat-

utes and there is no longer any existing analogy between putting a receiver into possession of mortgaged premises and any legal right or remedy which a mortgagee now enjoys or may resort to, yet the court of chancery has persevered in its ancient practice (doubtless borrowed from the practice of the chancery in England and where a different state of things exists in regard to the legal rights and remedies of a mortgagee) of appointing a receiver over a mortgagor and his tenants after default made in payment of the principal debt and a well grounded apprehension of a deficiency of the security. This has been the practice so long and it is so firmly established by order of the chancellor—and even, I believe, in cases without reference to the point whether, by the terms of the mortgage, the rents and profits were expressly pledged or not as a part of the security—that I am not at liberty to depart from it or to doubt the authority of the court in this particular. At the same time, I confess myself unable to discover the analogy or the principle under our laws in relation to the nature and true character of a mortgage, which authorizes such an interference with the legal rights of a mortgagor, unless, indeed, he has, by the express terms of his contract, pledged the rents and profits—as well as the *corpus* of the estate—as security for the debt.

There are no conflicting claims to the rents in question, other than those between the complainants as mortgagees and the assignee (in bankruptcy) of the mortgagor and his grantee; and as between these parties, the mortgagees are entitled, under their receiver, to the rents; and on account of the deficiency shown by them, the prayer of their petition—that the receiver account and pay the money to them—must be granted.

1844.

POST  
V.  
DORE.

1834.

WARREN  
v.  
SPRAGUE.

WARREN, Receiver &c. v. SPRAGUE.

Where a receiver files a bill, his solicitor should not be the same person who has acted in the original suit. It might be ground to dismiss it. But in a case of the kind and where also the defendant's solicitor was the same as the original defendants had employed and he entered an appearance knowingly and without moving beforehand, the bill was not dismissed on motion. The receiver, however, was ordered to get another solicitor and to pay the costs of the motion.

June 13,  
1844.

*Practice.  
Receiver.  
Solicitor.  
Bill.*

OLIVER AMES had filed a judgment creditor's bill against Horace St. John and George Witherell; and the present complainant had been appointed a receiver therein. Mr. Richard M. Kimball was the solicitor for the complainant in the original suit; and he was also appointed on the papers as solicitor for the present complainant (the receiver.) It appeared too that the solicitor for the judgment debtors was the same as for the present defendant.

Motion to take the bill off the files.

Mr. *J. M. Martin*, for the defendant.

Mr. *Kimball*, against the motion.

June 25.

THE VICE-CHANCELLOR:—Where a bill or answer has been filed without the signature of counsel, it has been the practice to move that it be taken off the files for irregularity; and the court will so order, unless special circumstances are shown: such, for instance, as that the pleading had been actually perused by counsel and, through inadvertence, his signature was omitted. In such a case the court will allow it to stand upon the counsel affixing his signature and payment of costs: *Carey v. Hatch*, 2 Edwards's V. C. Rep. 190; *Littlejohn v. Munn*, 3 Paige's C. R. 280.

So, the filing of the bill in this cause by the solicitor who was prosecuting the original suit in which the receiver was appointed, rendered the bill irregular; and would authorize its removal from the files. But the defendant happens to

appear by the same solicitor as appeared for the defendants in the original suit; and, so, such solicitor knew that the solicitor for the original complainants was the same as the one now appearing and employed by the receiver in the present suit.

Although this appearance is not a waiver of the objection, yet I consider it is such a step, on the part of the defendant in the receiver's suit, as may well authorize the court to let the bill remain on the files, upon the receiver's substituting another solicitor who has no concern with the original parties and upon payment of the costs of this motion to be taxed. Order accordingly.(a)

(a) This order was affirmed, on appeal, August 27, 1844. But, as the chancellor took different ground from the vice-chancellor, it may be well to give the views of the former: "The only error in the order appealed from is that the application to take the bills off the files was not denied with costs, instead of requiring the complainant to appear by a new solicitor and to pay the costs of the defendant upon the motion. But that was an error in favor of the appellant; and of which he has, of course, no right to complain by appeal. The rule which prohibits a receiver from employing the solicitor for either of the parties to the suit in which he is appointed receiver is intended to protect the rights of those parties. And if they have no objection, the receiver may employ the solicitor of either to aid him in the discharge of his trust. A mere stranger to that suit, therefore, has no right to object that the receiver has employed the solicitor of one of the parties in the original suit to institute a new suit against such stranger. The proceedings of the complainant in filing this bill were, therefore, strictly regular, so far as regards the defendant therein; and he had no right to raise the objection that the solicitor employed by the receiver to file the bill against him was solicitor for the complainant in the suit in which the receiver was appointed.

"The order appealed from, not being erroneous as to the appellant, must be affirmed, with costs."

1844.

WARREN  
v.  
SPRAGUE.

1844.

MATTER OF  
MASON.

IN THE MATTER OF THE PETITION OF JOHN L. MASON,  
Trustee, &c.

A testatrix devised a lot to executors in trust to receive rents until her youngest child attained 21 years of age and apply the rents for the benefit of her two youngest children until \$350 should have been so obtained for each, which amounts were to be placed in the Savings Bank to accumulate until they should attain 21, unless the interest or principal should be necessary for support or education; and after these sums (of \$350) had been set apart, the rents of the lot were to be appropriated to the support of all her children (five) until the youngest became 21, &c.; and, then, to sell the property and divide the proceeds equally among the children share and share alike or among those living and the representatives of those who should be dead, the representatives to take no more than the parent would have taken. The sole acting executor (after nine years of trust) died and this court had appointed a trustee who, on the coming of age of the survivor of the two youngest children, sold the lot. It did not appear whether such executor had laid aside either of the sums of \$350 out of the rents or that its use was wanted for support, &c. Three of the children had died, embracing one of the two youngest, two intestate, but one of the latter left a daughter and the other devising his share under the will to the surviving younger brother: *The court held*, that \$350 could not now be taken from the purchase money of the lot for the youngest surviving child; and that it was to go in thirds, one-third to the daughter of the deceased child and two-thirds to the surviving younger brother.

June 25,  
1844.

*Will.*

PETITION of John L. Mason, trustee, appointed by the court to execute trusts contained in the will of Marcella O'Neil, deceased. It set forth such will, containing the following clauses:

"*Item.* I give and devise to my executors hereinafter named and to the survivor of them my house and lot No. 90 Mulberry street, in the city of New York, in trust to receive the rents and profits thereof during the minority of my children and until the youngest child shall arrive at the age of twenty-one years and to apply the net rents and proceeds thereof (after paying the ordinary charges thereon) in the manner hereinafter mentioned, that is to say, in the first place, to apply the said net rents and profits, as the same shall, from time to time, be received, for the sole bene-

1844.

  
MATTER OF  
MASON.

fit of my youngest children Henry and John, until the sum of three hundred and fifty dollars shall have been in this manner obtained for each of them; which amounts, that is three hundred and fifty dollars for John and the like sum for Henry, I wish and direct my executors to place for them in the Savings Bank of the city of New York to accumulate for them until they shall respectively attain the age of twenty-one years, unless the interest or the principal thereof may be necessary for their comfortable support, maintenance and education; and I hope that my other children will not imagine that this provision for their younger brothers arises from any undue partiality, since the advantages of education and age which they enjoy more than counterbalance it and will enable them, in case any unforeseen accident, to maintain themselves entirely by their own industry, while their younger brothers might be otherwise entirely destitute. After the said sums of three hundred and fifty dollars for each of the said boys, Henry and John, is set apart as above directed, I desire that the rents of the said house and lot should be appropriated to the support, maintenance and education of all my children, Mary Jane, Felix, Ann, Henry and John, until the youngest child becomes of age, in case the income which they may receive from the property they inherit from their father be not sufficient for that purpose; but if it be, then, it is my will that the said rents and profits be applied to the extinguishment of the principal of the mortgage now on the premises. And when the youngest child shall become of age, it is my will and I do hereby authorize and empower my executors hereinafter named and the survivor of them to sell the said property and divide the proceeds thereof among the said children share and share alike or among such of them as shall be living at that time and the representatives of such of them as shall be dead, such representatives to take no more than such deceased child would have had, had he or she been living." — "And I do hereby appoint Francis Cooper, of the city of New York, gentleman, and my brother-in-law, Felix O'Neil, executors of this my last will and testament; and earnestly request that they become the guardians of my children, &c."

1844.

MATTER OF  
MASON.

The petition went on to show the death of the testatrix, the proving of the will in the year one thousand eight hundred and thirty-two and the granting of letters testamentary to Felix O'Neil alone; that he died in the month of December one thousand eight hundred and forty-one; and that on the twelfth day of January one thousand eight hundred and forty-two, by an order of this court, made on the petition of John O'Neil, an infant and one of the children of the said Marcella O'Neil, the petitioner now before the court, Mr. John L. Mason, was duly appointed trustee to perform the trusts declared in the said will; and that the said petitioner had acted as such trustee. That the whole estate of the said Marcella O'Neil which had come to the knowledge of the said petitioner consisted of a house and lot No. 90 Mulberry street, mentioned in the will. Also, that the testatrix, Marcella O'Neil, left her surviving five children, namely, two daughters, Mary Jane and Ann and three sons, Felix A., Henry C. and John; that the said Ann O'Neil had departed this life under the age of twenty-one years unmarried and without issue; that Mary Jane O'Neil died in the year one thousand eight hundred and thirty-seven, having previously intermarried with one Daniel McGrath, who was also dead, leaving her surviving Eliza McGrath, her only child, who was now of the age of seven years or thereabouts and that John McGrath had been duly appointed guardian of the person and estate of the said Eliza McGrath. That John O'Neil was the youngest son of the said Marcella O'Neil and that he had died in the month of July one thousand eight hundred and forty-three, aged nineteen years and seven months. That, as the petitioner was advised and submitted, from the fact of the death of the said John O'Neil under age, it became the duty of the petitioner to sell the said estate and distribute the proceeds; that, in accordance with this view, he had sold at auction the said house and lot No. 90 Mulberry street, to Henry C. O'Neil, the only surviving son of the said Marcella O'Neil, for thirty-two hundred dollars. That Felix O'Neil, the oldest son of the said Marcella O'Neil, departed this life on the twenty-eighth day of January one thousand eight hundred and forty-four, having previously made his will

1844.

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MATTER OF  
MASON.

whereby he devised and bequeathed all his estate, real and personal, to his brother the said Henry O'Neil; that the will had been proved and the said Henry, as executor, had had letters testamentary granted to him thereon. That the said Henry O'Neil claimed and insisted that he was entitled, as one of the children of his mother, under the will aforesaid, by reason of the death of the said Ann O'Neil and John O'Neil without issue to one third part of the net proceeds of the said real estate and that, by reason of the devise to him by his brother Felix O'Neil, he was entitled to another third part of the nett profits of the estate so purchased by him and that the said Elizabeth McGrath was only entitled to one-third part of the said nett proceeds. And that the said Henry C. O'Neil, also, claimed to be entitled, in addition to the said two-thirds, to the sum of three hundred and fifty dollars, given to him by the said will out of the rents of the said estate, which he alleged had never been received by him. That, after the said petitioner's appointment as trustee, he collected the rents of the said house and lot as far as they could be collected; and that he divided them between the said Felix O'Neil, Henry C. O'Neil and John O'Neil, being advised that, by the true construction of the will of the said Marcella O'Neil, the said Eliza McGrath was not entitled to participate therein during the continuance of the said trust estate. And the said petitioner was advised and believed that, on the death of the said John O'Neil, the said Eliza McGrath became and was entitled to one-third part of the nett rents which should accrue and be received from the said house and lot after the death of the said John O'Neil. That, inasmuch as the said Eliza McGrath was an infant of tender years and was incapable of ratifying the acts of the petitioner in the premises or of giving him a release on the full execution of the trust, the petitioner was desirous of having the said sale of the said house and lot ratified and confirmed by this court and the proceeds of the sale distributed under its direction among the parties entitled thereto and that he might be discharged from the trusts of the said will on passing his accounts.

*Prayer:* That it might be referred to a master to take



1844.

MATTER OF  
MASON.

proof of facts and circumstances; examine and report what portion of the rents and profits and of the nett proceeds of the said household lot belonged to the said Henry O'Neil and the said Eliza McGrath respectively and to pass the accounts of the petitioner, as such trustee; and that the said sale might be ratified; and that, on the coming in and confirmation of the said report and on the petitioner paying to the said Henry C. O'Neil what might be reported due to him and, also, bringing into court and depositing with the clerk thereof the monies which might be reported due to the said Eliza McGrath, after deducting the costs and charges to which the petitioner might have been put in the premises, including the costs and expenses of this proceeding, that the petitioner might be discharged from the said trusts.

*Mr. J. L. Mason, in pro. per.*

*Mr. James T. Brady*, for the child of the deceased son, contended that all were to be benefitted from the outset; and that the fund should be distributed so as to make all equal.

March 11,  
1845.

**THE VICE-CHANCELLOR** :—The testatrix died in April one thousand eight hundred and thirty. Felix O'Neil was the sole acting executor and trustee of the house and lot No. 90 Mulberry street, up to the time of his death in December one thousand eight hundred and forty-one. Mr. Mason succeeded him as trustee of the house and lot, under an order of this court made on the twelfth day of January one thousand eight hundred and forty-two. The former trustee's accounts are not presented so as to show whether or not he set apart or kept in his hands, out of the rents, the three hundred and fifty dollars given to each of the two younger boys. It was his duty, by the will, to obtain, out of the rents, that amount of money for each of them before appropriating the rents to other purposes; and, when those sums were made up, he was to deposit the money in the Savings Bank for them or to expend it in their education and support. It is to be presumed, until the contrary is

proved, that the former trustee performed his duty in that respect and that, during the nine years of his stewardship, he either expended that amount of money for the two boys out of the rents before making a general division among all the children or deposited it in the bank or retained it in his hands for them. Even if it should appear that they have never had the benefit of these preferred gifts of three hundred and fifty dollars out of the rents, it does not follow that the money is now to be paid out of the capital of the estate. Those were not gifts or legacies charged upon or payable other than out of the rents; and there is no sufficient reason, in my opinion, for allowing Henry to take the three hundred and fifty dollars out of the proceeds of sale of the house and lot at this time. Eliza McGrath, the infant, is entitled to her one-third of the net proceeds of sale, in right of her mother, free from the deduction of Henry's three hundred and fifty dollars. In all other respects, I believe the master's report upon the accounts and in relation to the distribution of the funds in Mr. Mason's hands, as trustee, is correct.

*Ordered:* That the three hundred and fifty dollars, claimed to be due to Henry C. O'Neil out of the proceeds of the sale of the house and lot, be disallowed; and that the nett proceeds of the purchase money in the hands of John L. Mason, as trustee, free from such deduction or claim, be divided, two-thirds thereof to Henry C. O'Neil and one-third to the infant Eliza McGrath and that her share be paid into court, to be invested for her benefit. The costs of the petitioner, including the master's bill on the reference and the costs of the infant, to be paid out of the fund before the division is made.

1844.

MATTER OF  
MASON.

1844.

CLARK  
v.  
MARTIN.

CLARK and others v. MARTIN and others.

(Two suits.)

The court retained an injunction where, on the coming in of an answer, there seemed to be some equity in the complainants claim to have the fund which was in litigation applied as prayed for which might, at the hearing, possibly, be enforced.

July 2,  
1844.

Practice.  
Injunction.

APPLICATION to dissolve an injunction on bill and answer.  
The facts producing the principle in this case appear in the opinion of the court.

Mr. W. C. Noyes, in support of the motion.

Mr. Lockwood, contra.

January 6,  
1845.

THE VICE-CHANCELLOR :—The allegations of the bill on which the complainant's equity is based, are not denied, because the defendants are ignorant of the facts as stated. They are these : that on or about the seventeenth day of January, one thousand eight hundred and forty-three, or, at all events, by the twentieth of that month, the complainants bought and paid for certain drafts or bills of exchange, drawn by Franciscus, at St. Louis, on Corning & Co. and on I. T. Smith & Co. in New York, which bills or drafts were presented for acceptance about the first day of February, one thousand eight hundred and forty-three ; but were not accepted, because, intermediate the time of drawing and of their presentation, the funds of Franciscus, the drawer, in the hands of the drawees, had been attached by the defendant Martin, on process of attachment procured to be issued against Franciscus as a non-resident debtor. This attachment issued on the twenty-third day of January, one thousand eight hundred and forty-three ; and notice of it being immediately given to Corning & Co., and Smith & Co., it prevented their accepting the bills, which, but for the attachment, they would have done. It is further alleged and not denied that the debt of Franciscus to Martin, on which

the attachment issued, was contracted in the month of December, one thousand eight hundred and forty-one; that in April, one thousand eight hundred and forty-two, Franciscus presented his petition in bankruptcy, at St. Louis, in Missouri; that in June, one thousand eight hundred and forty-two, he was decreed a bankrupt; and, in June, one thousand eight hundred and forty-three, received from the court there a certificate of discharge from all the debts owing by him at the time of being declared a bankrupt, including the debt of Martin. It further appears from the bill and is not denied that the funds in the hands of Corning & Co. and Smith & Co., on which the bills were drawn in January, one thousand eight hundred and forty-three, were earned or acquired by Franciscus subsequent to his being declared a bankrupt in June, one thousand eight hundred and forty-two, and while his proceedings were going on to a discharge which he so, afterwards, obtained in June, one thousand eight hundred and forty-three.

Now, upon this state of facts, seeing that the debt to Martin has been discharged by the bankrupt proceedings, although Franciscus has taken no step to avail himself of the benefit of the discharge nor to supersede the attachment proceeding, but on the contrary has suffered it to go on even to the appointment of trustees, there seems to be some equity in the claim to have the money in question applied to the payment of the bills of exchange, which it is possible this court may enforce. I shall, therefore, retain the injunction until the hearing.

Motion to dissolve, denied.

1844.

CLARK  
v.  
MARTIN.

1844.

WARING  
v.  
SUYDAM.

## WARING v. SUYDAM and others.

Matter repeated in an answer is impertinent.

A defendant who assumes to answer the whole of a bill of discovery cannot stop short and submit to the court whether he is bound to answer particular parts. Such submission will be adjudged impertinent. In order to protect himself he should demur to such parts and properly, in form, answer only to the remaindor.

An exception for impertinence, which covers more than should be expunged, makes the whole exception nugatory.

A clause in an answer, although somewhat argumentative and prolix, will not be deemed impertinent where it may have a bearing on costs.

A defendant who submits to answer a bill of discovery generally, cannot, by answer, protect himself from discovery by insisting that matters in the bill are impertinent and the complainant has no right to the discovery. If the proposed discovery is such that the defendant is not bound to make it or the complainant has not a right, from the nature of the case, to call for, the defendant should demur or if the discovery, when made, would be immaterial and unnecessary as evidence, the defendant may refer the bill for impertinence.

July 8,  
1844.

*Pleading.  
Answer.  
Exceptions.  
Impertinence.  
Insufficiency.  
Bill of discovery.*

CASE of exceptions to a master's report, having reference to exceptions taken to an answer to a bill of discovery.

The opinion of the court sufficiently illustrates the points reported, without necessity of any reference to the pleadings.

Mr. *Greig*, for the defendant and in support of the exception taken to the master's report.

Mr. *Cowles*, for the complainant.

Dec. 10,  
1844.

THE VICE-CHANCELLOR:—We have here twenty-one exceptions taken to the answer: twelve of them for impertinence and nine for insufficiency—and as to those for impertinence, eight have been allowed by the master, namely, the second, third, fifth, sixth, seventh, ninth, tenth and eleventh exceptions. And exceptions to the report in respect to the allowance of the third, sixth, seventh, ninth and tenth. As to those taken for insufficiency, six were allowed, namely, the thirteenth, fifteenth, sixteenth, seventeenth, eighteenth

and nineteenth; and the report is excepted to in respect to the allowance of each one of these.

As to the third exception (for impertinence.) I consider that it was properly allowed by the master, on the ground that the same thing, in substance, is previously set up in the answer and again in the latter part of the same pleading. It is against the rules of good pleading to stuff the answer with repetitions and immaterial suggestions. The matter of this exception seems to be of that character.

The sixth and a part of the seventh and the matter of the ninth exception (all, also, taken for impertinence) appear to be improper and useless in an answer to a bill of discovery. If it were a bill for relief, as well as discovery, there might be no impropriety in submitting such points or matters to the court as grounds for not granting relief even upon a full discovery being made, but where the object is discovery merely and the discovery is fully made, it is certainly useless for the party to insist and to submit to the court that the inquiries made of him are impertinent and such as the party filing the bill has no right to make; and if he has not answered to those matters at all or only to a partial extent and would protect himself against answering particular parts of the bill, he should demur to those parts distinctly and not, after assuming to answer the whole and every part of the bill, stop short and submit to the court that he is not bound to answer fully every thing required by the bill. For these reasons, I think the master decided correctly in allowing the sixth and ninth exceptions. And a part of the seventh exception down to the beginning of the twenty-second folio stands upon the same footing. But the remainder of what is comprised in the seventh exception on the twenty-second folio seems to me as not being impertinent but responsive to the bill; and why it should have been included in the seventh exception, being part of another paragraph, I am at a loss to understand. As the seventh exception covers more than ought to be expunged from the answer, although well taken as to part, the whole must be allowed: because an exception for impertinence cannot be allowed in part and disallowed in part.

The tenth exception (likewise for impertinence) should in

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my opinion, have been disallowed, instead of being allowed by the master. Although it is a clause couched in terms rather argumentative, yet it is a sort of general traverse or denial, which may have some bearing on the question of costs; and as it is not a very prolix matter, there is some propriety, at least, in letting it remain.

With respect to the exceptions for insufficiency, being the thirteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth allowed by the master: they all depend on one principle; and must stand or fall together—for it is conceded that the bill calls for the discovery which the exceptions aim at; and that the answer has not given it: the defendants seeking to protect themselves from answering these particulars of the bill, by insisting, in the answer, that the matters are impertinent and that the complainant has no right to a disclosure of the transactions of the defendants in those matters of business with which the complainants had no concern.

This appears to me not to be a case in which defendants can protect themselves from answering fully, by taking an objection in the answer and by way of answer. As a general rule, the defendants having submitted to answer generally and not to answer a part or parts of the bill, taking care to cover other parts by a plea or demurrer, are bound to go on and answer fully every material allegation of the bill and all the interrogatories founded on the allegations and charges. And the defendants have not, in this instance, brought themselves within any exception to this rule: see *Bank of Utica v. Mersereau*, 7 Paige's C. R. 517. If the discovery called for is of such a character that the defendants are not bound to make it or the complainant is not, from the nature of the case, entitled to call for it, the defendants should have demurred or, if the discovery, when made, will be entirely immaterial or unavailing to the complainant as evidence, the defendants might have referred the bill for impertinence. But it appears to me that it is not immaterial if true; and, from the nature and character of the business which has given rise to this controversy, it is just such a disclosure, in all its particulars, as the complainant is entitled to have made. I must, therefore, hold the master's

decision to be correct in allowing the six exceptions for insufficiency.

Order, that the exceptions of the defendant to the master's report, in respect to the allowance of the third, sixth and ninth exceptions to the answer, for impertinence, be overruled; that the exceptions to the report in respect to the master's allowance of the seventh and tenth exceptions for impertinence be allowed; and that the master's report stand corrected accordingly. And that the clerk expunge the matters of the third, sixth and ninth exceptions now finally allowed and also of the second, fifth and eleventh, allowed by the master and submitted to. And further, that the defendant's exceptions to the master's report, in respect to the allowance of the thirteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth exceptions for insufficiency be overruled and that the defendants answer further on the matters embraced by such exceptions; that the defendants pay the complainants' costs of the twelve exceptions on which he has finally succeeded to be taxed, but not to include any costs of the reference—as to which, each party is to bear his and their own; and that the defendants also pay the complainants their costs on the hearing of the exceptions to the master's report, but not to exceed ten dollars—and the whole to be included in one bill of costs.

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TYLER v. POPPE and another.

Where defendants, having a lien and the possession of goods, are restrained by injunction from "selling, pledging or disposing" of the same : although the mere offer to sell may not amount to an infringement of the injunction, yet it might induce the court to appoint a receiver.

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*Injunction.  
Receiver.*

MOTION for an attachment on an alleged infringement of an injunction ; and, for a receiver.

The defendants, Edward Poppe and Charles E. Poppe, were commission merchants in the city of New York. The complainant, three or four years ago, came to this country from England ; and was introduced to the defendants as suitable persons to whom to consign a large quantity of sherry wine. On his return, he consigned to the defendants, in three shipments, about twelve hundred dozen of wine, valued at ten thousand dollars, on which Messrs. Poppe paid freight and duty and had the wine carried to their store and insured. The wine was not sold ; and the complainant arrived in New York in the month of January one thousand eight hundred and forty-three. He filed his bill ; and obtained a preliminary injunction against the defendants, restraining them from "selling, pledging, or disposing of any of the sherry wines of the above complainant in their possession or parting with the possession or control of the same or any part thereof until the further order of the court."

One ground of complaint against the defendants was that the complainant had given instructions that the wine should be left by Messrs. Poppe in the custom house stores, not only in reference to the fact that wine and brandy are injured in reputation by being taken to a private store, but in order to secure the drawback should he wish to export it. That, in order to secure this being done, he did not send any invoices, yet Messrs. Poppe procured false invoices to be made out and swore them through the custom house. The complainant, after coming out, had authorized the defendant to sell the wine for six dollars a dozen but they could not get

that for it. The complainants insisted that they had a right to sell the wine to cover their expenses and advances, amounting to six thousand four hundred and twenty-eight dollars and thirty-six cents.

In relation to the motions, it was shown that, on persons going to the store of the defendants and applying to purchase sherry wines, Charles E. Poppe offered to sell the wines in controversy. The credit of the defendants was also attempted to be impugned. In answer to this, it was urged that a mere offer to sell was not a violation of the present injunction; and that their credit was in no way impaired, they being worth the sum of one hundred thousand dollars after payment of all their debts. It appeared that the defendants were Germans, but had been in this country about ten years; and also, that the offer to sell was made from a want of knowledge of the nature of the injunction and the principal partner in the affair being in Germany. It was denied that they had received instructions to leave the wine in the custom house stores. The complainant's second letter directed the wine to be placed in a "dry bonded store," but contained no other intimation—and further, that the alleged fictitious invoice had been signed by a friend of the complainant, in order to save the expense of the wine being placed in the custom house store, an officer of the custom house having told them they could do so; that the complainant never set up the charge of infringement of orders till he and the defendants had some difficulty, when he preferred a charge of perjury before the grand jury, but it was thrown out. And that, as to the wine, they would be very glad to give it up, if they could receive even two thirds of their disbursement upon it.

Mr. *Gridley*, for the complainant.

Mr. *Sandford*, for the defendants.

THE VICE-CHANCELLOR:—A consignor should be very explicit in order to hold his consignees. The bills of lading were duly made out to the defendants and they obtained, in that way, lawful possession of the goods. As to the inten-

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tion of having the wines remain in the custom house, the instructions on that point were not sufficiently explicit. There is no such thing known here as a "dry bonded store," and the defendants were not bound to construe the term in the manner charged. There are matters of fact, however, in the case, which cannot be passed upon here.

As to the offer to sell the wines after the injunction had been allowed, it is no excuse for the defendant Charles E. Poppe to say that he did not understand it. He has been here for ten years and may be supposed to have understood it. The offer to sell, although it would not warrant the issuing of an attachment for a violation, would still be sufficient, in the discretion of the court, to authorize the appointment of a receiver; and if the court forbears from ordering the appointment of one at this time, there must be no more offers made to sell the goods. It appears that these defendants are persons of substance and able to meet any penalty for violation of injunction, should such, in future, take place.

Motion for attachment and receiver denied.

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HENRY D. CRUGER v. DOUGLAS and others.  
(Original Bill.)

HARRIET D. CRUGER, by her next friend v. HENRY D.  
CRUGER.  
(Cross Bill.)

Equity has no control over husband and wife where there is no cause for separation or divorce except with reference to property.

Chancery cannot compel cohabitation or a restoration of conjugal rights.

Where a husband, immediately after marriage and without consideration, alone executed an instrument of settlement, whereby he released and conveyed to trustees the wife's real and personal estate: "*To hold and keep both the principal and interest thereof during the said marriage, exempt from his debts, contracts or control, to be managed and disposed of on her separate orders or receipts or by her deeds or will, so that she may enjoy and dispose of the same as it came from her parents and sister or may hereafter in any manner accrue to her in all respects as if she were unmarried;*" and delivered the same to such trustees: *Held*, that the instrument was valid; that the statute against fraudulent conveyances, in requiring a consideration to be expressed, does not control an instrument which creates and passes the estate, title or interest: that a consideration is here implied by execution; and that a deed like the above is not to be deemed executory, promissory or as a covenant or agreement to do some future act.

Also, *held*: that the instrument is not void under the statute of uses and trusts: 1 R. S. 727 § 25 for, while the words, "*to be managed or disposed of on her separate orders or receipts or by her deeds or will, so that she may enjoy the same in all respects as if she were unmarried,*" would seem to give her all power as if she were a *feme sole* and the trustees be mere nominal parties, yet, when coupled with the words (applying to the trustees) "*to hold and keep both the principal and interest thereof during the said marriage, &c.,*" a requirement to perform active duties appears and makes the trust good.

A trust need not be clothed in the very words of the statute of trusts; a substantial compliance is sufficient.

Equity ascertains object and design. It looks for substance, rather than at form. Where words admit of different meaning, it grasps at that which upholds, not that which destroys.

The wife by a deed (under the power in the above instrument) irrevocably transferred to her husband a half of the income of her estate, real and personal, for life and directed her trustees to pay it. *Held* to be a valid instrument; and that the disabling language of the § 63 of the statute of uses and trusts did not affect it: because, here is an appropriation only of the benefits resulting from the trust in a manner compatible with its object and which does not put an end to the interest of the beneficiary.

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Although persons are alleged to have joined in conspiring to obtain the execution of a deed, yet (not being parties) they are competent witnesses. A deed, free from fraud and made with a view to effect a family settlement, although voluntary, will be upheld in chancery—public policy and the peace of families encourages it.

July 24, 25,  
 26, 30, 31;  
 Aug. 1, 2,  
 5; Oct. 16,  
 17, 18,  
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— — —  
*Husband  
 and wife.  
 Settlement.  
 Marriage  
 Settlement.  
 Jurisdic-  
 tion.  
 Fraudu-  
 lent Con-  
 veyances.  
 Voluntary  
 Conveyan-  
 ces.  
 Statute of  
 Frauds.  
 Uses.  
 Trusts.  
 Evidence.  
 Witness.  
 Deed.*

THIS case involved questions touching the validity and consequent effect of certain instruments on the properties of a married woman.

By the original bill, the complainant, Henry D. Cruger, showed that on the 29th day of June 1833, he was united in marriage in the city of New York with the defendant Harriet Douglas; and that, from that period to the present time, they had continued to live together as man and wife, except as thereafter mentioned; and that, during such living together, they were inhabitants of this state. That at the time of their marriage, and for many years previous thereto, he was engaged in the practice of his profession with such success as to enable him to live in entire independence and with every prospect of an increasing and lucrative business. That his wife, at her marriage, was in possession of or entitled to a large personal estate, amounting to \$100,000 and upwards, and real property estimated to be worth \$60,000 and upwards; and that she now was the owner of and entitled to an estate, which, if properly managed and reduced into possession, was believed to be worth \$400,000 and upwards: of which \$250,000 consisted of personal property. That, on his marriage, he became absolutely entitled to and invested with so much of the estate as was personal and the income of so much thereof as was real for life or during the marriage. That immediately after the ceremony of the marriage had taken place, he, of his own accord, executed and delivered the following settlement of the property to which his marital rights had thus attached:—

“A marriage having been solemnized between Henry D. Cruger, Junior, and Harriet Douglas, by means whereof he has acquired at law certain interests and rights in her property, the said Henry D. Cruger, Junior, hereby freely, fully and unreservedly releases and conveys all the estate, both real and personal, heretofore owned by her or which she

may hereafter acquire, and all his right, title and interest therein, to George Douglas, William Douglas, James Monroe and Robert Halliday, and to such substitutes as she may from time to time appoint, jointly and severally in trust to hold and keep both the principal and interest thereof during the said marriage, exempt from his debts, contracts or control, to be managed and disposed of on her separate orders or receipts or by her deeds or will, so that she may enjoy and dispose of the same as it came from her parents and sister or may hereafter in any manner accrue to her in all respects as if she were unmarried. In witness whereof the said Henry D. Cruger, Junior, has hereunto set his hand and seal, at the city of New York, this twenty-ninth day of June in the year of our Lord one thousand eight hundred and thirty-three.

HENRY D. CRUGER, JR. [L. S.]

"Signed, sealed, and delivered, in presence of

"BENJ. McVICKAR, 496 Broadway, New York.

"WILLIAM MOORE, Col. College, New York."

The complainant also showed that the marriage settlement or instrument in writing under seal, having been so made and executed, was thereupon delivered to the trustees named therein or one of them then present and the contents thereof were immediately made known to the wife who, thereupon, surprised and gratified, of her own accord, in consideration thereof, verbally gave the complainant, in return, the entire income of the estate for life, in the presence of two of the said trustees and of others then present, who were specially called by her as witnesses; of all which the complainant was shortly after informed by the said trustees. That it was his full intention, in thus surrendering the property he had become entitled to by his marriage, to continue his professional pursuits at large, irrespective of his wife's fortune; and that, as this gift rested in parol and was not reduced to certainty, he in no degree relied or acted upon it until one of the trustees, Robert Halliday, of his own motion brought the subject to the attention of his wife and represented to her the danger of leaving matters in so loose a state, as the declarations at her wedding would no longer

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operate even as a nuncupative will. Whereupon she signed and delivered the following order in duplicate, one to the trustees and the other to her husband :

"Bloomington, 15th July, 1833.

*To Robert Halliday, Esq.,*

As acting trustee and agent of my property, you are hereby authorized and requested to pay to Mr. Cruger, upon his written order or receipt, the income of my estate as it accrues.

Signed with all the heart of

HARRIET CRUGER."

Which order, direction and appointment was made and delivered by her of her own accord and was in confirmation and fulfilment of the gift made on the evening of their marriage. The complainant charged, that by virtue of the order, direction and appointment so made and confirmed, he became absolutely and irrevocably entitled to the whole income of the estate, whether in possession or otherwise, for and during his natural life; and that it was so received and understood by his wife, by himself and by the trustees, with the sole qualification that it was to be paid as it accrued—the power thus given him to receive the income being competent to his wife to confer under the settlement and there being no authority to revoke it reserved in the instrument creating the power. That in order further to insure the income to him for and during his life, his wife shortly afterwards, to wit, on the twenty-fourth day of the same month, made and executed and delivered to him a certain other appointment in the nature of a last will and testament under seal, whereby she gave and bequeathed the principal of her property to her collateral heirs and the income thereof she gave to him for his life. And he averred, that at the instance and through the persuasion of his wife and upon the faith and credit of the disposition of the income thus made by her in his favor, the same being abundant for all their wants, without his following any longer a laborious and engrossing occupation, he gave up his profession and withdrew from business in general; and, at the request of several members of his wife's family and of herself, devoted

much time and labor to the recovery, improvement and management of their several estates, being six in number and of large amounts respectively, investigating, arranging and promoting the interests of the estates thus entrusted to his care, ascertaining, rectifying and adjusting the books, vouchers and accounts belonging to them for periods of from six to eleven years and examining and putting in order the muniments and proceedings appertaining thereto during that space of time. And that, in further discharge of the office he had thus undertaken, he, in the spring of 1834, embarked for Scotland, to look after what had been left them by an uncle twenty-five years before; and, being clothed with full powers of attorney, he remained six months abroad for that purpose; during which time he saved and recovered for their estates, including that of his wife, very large sums of money, which he transmitted to this country and had invested at seven per cent. interest, instead of from two to three per cent., at which it had been lying there for a quarter of a century. That previously embarking on this mission, he deposited in his wife's hands the order she had given him as above stated on the trustees of her estate for the income and, also, the deed of appointment in the nature of a last will and testament which she had executed to carry out the same object as before mentioned. That in course of the correspondence which ensued between them in a letter of July 16th, 1834, she said:—"The interest of all my property you shall have as long as you live." But that before he returned home he wrote to her under date of 29th September following, to explain that his purpose in leaving the order and will with her was to put it at her option to cancel the one and revoke the other; and that if, on his return, he found this done, he would resume the practice of his profession at large. That so far from availing herself of this opportunity or giving the least intimation that she wished the disposition of the said income made thereby should be in any way changed, shortly after his return she restored the order to his possession and he went on to receive the whole income under it, as theretofore, from the trustees. That on or about February 14th, 1835, she made and executed and delivered to him another deed of

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appointment, in the nature of a last will and testament, to the same purport and effect, in respect to the disposition of the said principal and income, as by the one previously made, the latter being supposed to be defective. And he submitted that the same was further proof of the understanding and intent on the part of his said wife that, while the principal of her estate was to pass to her brothers and sister, the entire income was to be his for and during his lifetime. And he averred that he had, at all times, been willing to abide by and carry out this agreement in perfect good faith; and that all he had ever asked for was that the counterpart of the contract as to the income should be kept in like good faith. In proof whereof, he proceeded to state that when the sum of \$10,000 was awarded him in compensation for his services rendered to the estates whose interests he had been attending to, although the amount had been hardly earned and was all he was worth in the world and he had many better purposes to which he would gladly have appropriated it without adverting to his wife's large fortune or stopping at the consideration that it had been laid out as much for her benefit and enjoyment as his own, he called on the trustees to ascertain and report any excess beyond the income they might have expended since their marriage; and on being certified that they had gone beyond it to the extent of \$2,785 22, he immediately, in June 1835, replaced that amount in the hands of the trustees, to make good the principal of the estate. So, also, out of this fund, at the same time, he paid off to the trustees the sum of \$1080 60, being principal and interest of money loaned by them on bond and mortgage to his uncle, Henry N. Cruger, because he considered the debt as then desperate. And he repaid to William Douglas (his wife's brother) the sum of \$1000, borrowed from him shortly before for the purchase of horses for her use; and, moreover, applied \$1000 towards defraying current family expenses. All which was done to make good the capital of the estate, in consideration of and upon the faith of his having the whole income for life. That considering and believing this arrangement to be certain and final, upon the strength of it he determined to avail himself of the greatest advantage

the possession of wealth can give ; not idleness, but choice of occupation. That accordingly he made preparations to retire altogether from a profession he had long followed (not from preference, but on principle) and to embark actively in agricultural pursuits and, at the same time, to enter upon public life. That, in pursuance of this plan, with the full knowledge and approbation of his wife, he undertook the management of a large landed interest belonging to her estate, consisting of from 12 to 1500 acres, situate in Herkimer county in this state ; and against his own judgment and wishes, but to gratify her, he erected and furnished an appropriate residence on the spot, selected and according to the plans designated by herself, but, of course, for their joint use and benefit during life. That he was given the possession and control of this property with the full knowledge and concurrence of the trustees also and carefully and laboriously devoted himself to its management and improvement, whereby he soon doubled the rents and enhanced its value at least one-third ; and would, by this time, have made it yield from seven to ten per cent. instead of its present income of about three per cent. on its marketable value. Also, that, in like manner, whenever the opportunity had been afforded to him, he had uniformly added to the substantial and permanent value of the capital of his wife's property, although well knowing that, under the understanding above set forth, the fruits of his exertions were to enure, not to himself or to his heirs, but for the benefit of those who did not want it, who were making no returns even in favor of his wife and for whom he was suffering constant disparagement at her hands. Also, that on a subsequent misunderstanding with his wife as to money matters, notwithstanding all that had taken place, he instantly tendered to her again the order for the income of the estate ; thereby, by his own act, making it optional with her to revoke it and, in that event, proposed to resume the business of his profession ; instead of which, she gave him a confirmation of the order in the following form :

“ The whole income of the property I derive from my father and uncle, to be paid under the order to you, spent by you for our mutual benefit and a general account kept

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for me, if I call for it. The rents of the Herkimer lands to be paid me; the rest of the proceeds of my share of my sister's fortune to you, for your own sole use and no part or account of it ever given back to me. These will be confirmed by orders to my trustees.

Staten Island, 29th June, 1835.

HARRIET D. CRUGER."

For H. D. CRUGER, Esq."

And that to make no difficulties, he assented to this modification of the original order, but that, subsequently, his wife, from his having acted under it in one particular, in an entire mistake as to facts, but without asking any explanations or giving him the slightest notice, recalled the order from her trustees; and directed the agent to pay the income to herself, declaring, then, for the first time, that she had always intended the order to be revocable. After remonstrating against this breach of good faith and the intolerable state of incertitude and dependence to which it subjected him, he acquiesced in the revocation; but declining to occupy a position of false appearances, he left their expensive residence and taking accommodations suited to his own circumstances, invited his wife to join and share with him whatever his professional earnings might acquire. In consequence of this a long discussion ensued, in the course of which she wrote to him under date of July 27th, 1836: "I have but two clear and distinct wishes, as regards my property, namely, that you should enjoy with me and after me the entire income of it and my heirs the entire principal." And, subsequently, she herself referred all matters in difficulty to the umpirage of William Bard, Esq., conjointly with Captain John Whetten. Against the interposition of the former he protested in writing, on the ground of his being his uncle; and was willing that her own relatives, to whom he had already referred every thing, should make an adjustment; but, his wife waiving the objection, full information was laid, on both sides, before the arbiters and their decision was embodied in a letter from Mr. Bard to Captain Whetten, to the following effect:

"27th Nov. 1836.

MY DEAR SIR,—I agree in the views expressed by you,

"this morning ; and in the spirit of the proposition you left with me in writing. I hope our friends, forgetting entirely the past, will live the residue of their lives in affectionate harmony. A bystander would say they have happiness within reach—permit me to hope they will not reject it. It is proposed and I understand Mrs. Cruger assents, that the debts to the estate of Mrs. Cruger, which have accrued by loans to Mr. Cruger's family, shall be the property of Mr. Cruger and that the debts so created to the estate shall be paid by a sum taken out of the semi-annual income, to be accumulated until the whole debt is paid. Mrs. Cruger's wishes should be complied with on this point; though, knowing no use she can have now or in future for money, but to promote her own pleasure and happiness and that of those around her, I would advise her not to sacrifice either nor even her convenience to an imaginary duty, to those whose wealth puts them far beyond the need of her assistance. If, in the deduction of seven per cent. semi-annually, she thinks she will not feel the want of income, there can be no objection to retaining it—but she must agree to live within the remaining income ; and to do so, I would not advise her to refuse herself the gratification of a wish, purchased by the giving up the seven per cent. to the object she has in view. I do not think it worth the sacrifice of a wish. With the above deduction, the remaining income and, after the debt is paid, the whole income should be divided into two parts, over one of which (whenever desired by her) Mrs. Cruger should have the absolute control and over the other Mr. Cruger should have the absolute control during his whole life ; and this should be put, by legal papers, on such a footing that neither party can ever alter or amend this disposition of the income and not be left to a mere understanding between the parties. There will be no permanent peace unless this is irrevocably fixed and such papers drawn and executed as may be necessary for the purpose. It should be an understanding on the part of Mrs. Cruger, but still leaving her the final control over half the income, that her husband shall have the management of her whole income, to spend it for their mutual comfort and support, without accounting for the manner in which

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"it is spent, further than may be done and, where there are right feelings, is always done, in the mutual confidence between man and wife in whatever concerns their mutual interests. Whether Mr. Cruger receives the income or whether an agent receives it and deposits it in his name, can be a matter of no consequence; some expense may be saved if he does it. I see no other difference in the two modes. In giving the above opinion, I have endeavored to free myself from partialities of all kinds and to give such counsel to two individuals, in whose happiness I feel a deep interest, as I think is most likely to secure it.

Truly yours,

(Signed)

WILLIAM BARD."

And the complainant further stated that, with this decision, he was, at the time, perfectly satisfied, although it was an interference with his wife's absolute gift of the whole income and withdrew one half of it from his ownership; still, it was reasonable and fair and consistent with the relationship of husband and wife—he therefore acquiesced in it, hoping that it would lead to certainty and permanent peace. And he insisted that his said wife was bound to submit implicitly and to carry out, literally, this decision of her own chosen arbiters, made upon a full hearing and unqualified submission of all matters in controversy. On the contrary, she wholly refused to comply with the award of the said umpires—and in particular, she declined executing the legal papers considered by the referees so indispensable to secure the object of all parties; and in lieu thereof, addressed a letter, under date of November 30th, 1836, to her sister, Mrs. Elizabeth Mary Monroe, in which she used the following language: "Know then that, though the offer has been twice rejected by Mr. Cruger, I now assign to him, willy nilly, all the evidences I hold, not only of the advances made to Messrs. N. and L. Cruger, but those to himself, his sister, his brother-in-law, his uncle, and his uncle-in-law, which, on reference to Mr. Halliday, I believe you will find is getting over \$40,000. The most of this, my dear sister, is out of the principal of my estate; but you (the only one of my three heirs who know my circumstances) have urged me to it. Of myself, I never would have signed away or even

compromised the collateral birth-right; you, George, and William, have—and when the post-nuptial settlement was made, I thought I had secured them. I also mean to relinquish my plan of reserving a per-centage of my income to gradually restore the sums taken from my principal, which would have (had I lived long enough,) again given you the unimpaired whole I had received by my birth-right. Thus Mr. Cruger remains in the full possession of my whole income, lessened only by the non-payment of interest by some of those of his family, to whom he has made loans. I never will sign any other papers than those that are signed, my will, and my revocable order; but I have said to Mr. Whetten, and will say to all those who deserve the respect, ‘when you see me revoke that order (let Mr. C. act as he will,) you may give me up, for I will then be given up of God!’ Mr. C. in signing the settlement, has signed the only paper in my favor I ever will receive from him; that secures your rights, in which are wrapped up my duty to my deceased parents. And now to this solemn paper I put my name.

(Signed,) HARRIET DOUGLAS CRUGER.”

On which paper was moreover endorsed :—

“I truly believe my sister is sincere in the declarations made in this letter, and that she will strictly adhere to them throughout her life.

(Signed,) E. M. MONROE.”

“I have entire confidence in the above sentiments.

(Signed,) JOHN WHETTEN.”

That the said letter was put into his hands as a substitute for a regular deed and as having the same validity in honor and good conscience. But, warned by the prophecy of the arbitrators, that there would be no permanent peace if matters were left to a mere understanding and not irrevocably fixed by papers necessary for that purpose and apprehensive, himself, from the experience of the past, that it was a dangerous power to leave in his wife's hands, he, at first and for some time, was reluctant to receive so informal a document—but being urged by his wife's relatives and considering that the faithful performance of the stipulations it contained were guarantied by her own and only sister and

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by her venerable friend and chosen adviser, and by an imprecation of her God, for the sake of peace and in the hope that, by indulging her humor, he would conciliate harmony, he, at length, acquiesced and again abandoned his intention of returning to the bar, and went on with the mode of life he had preferred, the permanent profits of which were to redound to his wife's heirs.

That the loans to his family, referred to in the above recited decision of the arbiters, and thus absolutely assigned by his wife to him, whether he would or not, consisted ;— 1st. Of advances made to his brother, Lewis Cruger, to enable him to purchase a sugar plantation in the state of Louisiana. These amounted to \$20,060, the re-payment of which was secured by bond and mortgage on the property— and the debt he believed to be perfectly safe, although it would occasion the entire sacrifice of the property, were the said mortgage enforced at the present time. 2d. A loan to Nicholas Cruger, also a brother, of \$10,000, to enable him to enter into mercantile business in New York ; for which, having become unfortunate in business, he was entirely unable to respond. 3d. The sum of \$1500, loaned to his uncle Henry H. Cruger, on his bond, secured by mortgage on a house and lot in the village of Angelica, and 362 acres of land in the county of Alleghany, state of New York. This debt he believed to be safe. 4th. A bond given by him, to the trustees of his wife's estate, for \$9,500, to cover all other advances from the principal for loans to his relatives and expenditures beyond income up to the period of its date, to wit, June 29th, 1836. The loan to his uncle, Henry N. Cruger, of \$1000, had been paid off, as above stated. That these loans were made at the instance and on the free-will offer of his wife, who had always taken full credit for them, as acts of kindness and liberality on her part ; that they were, moreover, arranged with the knowledge and concurrence of her acting trustee and agent, Robert Halliday ; the persons to whom they were made, always giving every security in their power. And that the complainant, although not called upon in each instance, except that of the loan of \$1500 to Henry H. Cruger, became himself responsible, by either giving his own bond or joining in those

given by the other parties—thus fulfilling, conscientiously and to the letter, as far as in his power, his share of the agreement to preserve the principal of the estate untouched, in consideration and on the faith, as he expressly alleged, of his receiving the whole income during his life. That, although his wife had repeatedly given him the bonds and mortgages above mentioned, as declared in her letter to her sister, he always declined receiving them, on the ground that it was a departure from the understanding between them that he was to have nothing of the estate but its income : and he had always been willing, so long as this portion of the agreement was kept in good faith, to abide by its reciprocal obligation. But he submitted that, failing this consideration, he was fully entitled to the benefit of whatever deviations might have supervened in his favor. That, considering the arrangement last made as final and such as he might rely on under the circumstances with implicit confidence, he went with his wife to pass the summer of 1839, at their country residence in Herkimer county, during which time he was actively and effectively occupied in the improvement of the property under his management, in the well assured expectation that he was to reap the fruits of his labors, at least during his own day and generation. That in the fall his wife left him, to make a visit to her brother on Long Island and to prepare their residence in town for the winter—and in preparing to follow her, in order to pay off the workmen on the place and the bills contracted during the season for family expenses, he drew upon the agent of the estate in town, through a bank in the neighborhood ; which draft came back protested for non-acceptance, although there would have been abundant funds in his hands to meet it at maturity. That, at this time, Francis Brown was agent of the estate, who stated, by letter, that he had received instructions not to pay him the quarter's income next accruing, but to appropriate it in a different channel : and hence it was that the draft had been dishonored and he was left destitute of the means not only of meeting the engagements he had entered into on the faith and credit of having the whole income at his disposal, but of funds to defray the current expenses of his household. Upon inquiry,

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he then ascertained that the order to the agent, thus diverting the income from his control, was given by William Douglas and Robert Halliday, two of the trustees, at the instigation of his wife, but without the concurrence of the other trustee, James Monroe, whom they did not venture asking to join in so outrageous an act, although he had previously been co-operating with them and was at the time in the city if not in the very house where and when the said order was signed. And thus the complainant, after all that had passed, was made to feel that he was at the mercy of the capricious monied tyranny of, not only his wife, but, at second-hand, of the trustees also. And he averred that his actual though not direct revocation of the Order in his favor for the whole income took place in his absence, without consulting his convenience or giving him the slightest notice; and was made on a mere pretext of paying off the interest on a debt due by his wife's estate to that of her sister Margaret Douglas the younger, deceased—although that estate was at the time indebted to his wife's in a much larger sum. He then insists that whilst the Order on the trustee to pay him the income of the estate was in force, which his wife had so solemnly and explicitly pledged herself never again to revoke, it was not competent for her trustees, nor even herself, to interfere with any part of the said income, nor to divert a dollar of it from his hands for any purpose whatever; and that this could be done only by a violation of good faith and by a breach of a positive contract. And when it was thus done, he earnestly remonstrated with his wife and with her trustees and appealed to her own family and friends to rescue her from a course of conduct so perfidious and dishonorable and her husband from a state of such harassing and degrading insecurity and dependance. Whereupon she gave to her brother-in-law and trustee, James Monroe, full authority to arrange matters as he might think proper and advisable,—engaging to abide by such arrangement when completed. And in earnest that she would do so, she placed in his hands an order or stipulation, of which the following is a copy :

"NEW YORK, 26th October, 1839.

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*James Monroe, Esq.*, 28 Park Place:

Dear Sir :—I hereby give to my husband, Mr. H. D. CRUGER, the power to draw the whole of my present income as it accrues during his life.

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(Signed,)

HARRIET D. CRUGER.

"The above is different from my former order one syllable of a word—that was meant to be revocable, this is irrevocable."

And the complainant insists that this order, thus given, was an admission that she had, as far as in her power, revoked the former order and that this was all that was necessary as a remedy for any difficulties. Being clothed in this way with plenary authority, Mr. Monroe wrote to him to inquire what settlement would meet his views; and in answer, he declined expressing any wishes or opinions whatever upon the subject, preferring to leave the whole matter to his wife and her friends—only asking, that whatever was done should be done in a definitive and permanent form, so that he might know what he had to depend upon and the only real cause of difficulties in his married life might be taken away finally and for ever. And, at the same time, he released and absolved his wife from all previous promises and engagements, and offered, if she chose to withdraw the whole income from him, to acquiesce—and, even then, to go to work and provide for himself as best he might.

That thereupon, the said James Monroe had a deed prepared, which was duly executed by Mrs. Cruger and acknowledged by her before a commissioner, on an examination separate and apart from her husband, as her own free and unbiassed act, in the words following:

"*Know all Men by these Presents*, That I, HARRIET DOUGLAS CRUGER, the wife of Henry D. Cruger, Esquire, for divers good causes and considerations me thereunto moving, and by virtue of my marriage settlement with him, and of every power and authority enabling me so to do, have settled upon, and limited and appointed to, and by these presents, do settle upon, and limit and appoint to my said husband, all and singular the net annual or other periodical income of my present property and estate, both real and

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personal, which is now in the hands and under the control of my trustees under the said settlement, to have and to hold the same unto my said husband, for and during the rest, residue, and remainder of his natural life, to and for his own use and benefit; meaning and intending to except from the said settlement hereby made my share in the income of my mother's estate and in that proceeding from my rights in law and equity under my sister Margaret's will.

In witness whereof I have to these presents set my hand and seal this second day of November in the year of our Lord one thousand eight hundred and thirty-nine.

Signed HARRIET DOUGLAS CRUGER, [L. S.]

Sealed and delivered in presence of

WILLIAM J. PROCTOR,  
JAS. MONROE,  
ROBERT HALLIDAY,  
GEORGE W. STRONG,  
WILLIAM BARD."

Which deed so executed in the presence of her relative, William J. Proctor—her trustees, James Monroe and Robert Halliday—her solicitor, George W. Strong—and her former umpire, William Bard—was forwarded to him by her then umpire, chosen and empowered by herself, the said James Monroe, as an instrument made in good faith and for the best of purposes, valid, binding and conclusive; and was so received by him, who, immediately on its coming to hand, executed, acknowledged and remitted to the said James Monroe an obligation of the following purport:

*"To George Douglas, William Douglas, James Monroe and Robert Halliday, and their successors:*

By deed of appointment, bearing date the second day of November, one thousand eight hundred and thirty-nine, my wife, HARRIET D. CRUGER, having settled upon me for life, all and singular the net annual or other periodical income of her present property and estate, both real and personal, which is now in your hands and control as her trustees, under her marriage settlement, with the exception of her share in the income of her mother's estate and of her rights in law and equity under her sister Margaret's will: Now know ye, that I, HENRY D. CRUGER, for divers good

causes and considerations me thereto moving, by these presents do authorize and empower you, as trustees of the said estate, to retain and pay over to the said Harriet D. Cruger, for her own use and benefit, as often and whenever during her lifetime she shall in writing so require, and upon reasonable notice to me given, so much of the said income thus appointed and settled as will, with what she has above reserved to herself, constitute one-half of the whole income of her estate for the time being.

In witness whereof I have hereunto set my hand and seal this fifth day of November, one thousand eight hundred and thirty-nine.

(Signed,) HENRY D. CRUGER, [L. S.]

Sealed and delivered in presence of

JONAS CLELAND,  
LAWRENCE HARTER,  
EPHRAIM TISDALE."

That his motive in thus securing a half of the income to the ulterior disposal of his wife was not from any doubt but that she was bound to give him the whole, but simply because the arbiters, whose decision in 1836, she herself had set at nought, had recommended that this should be done; and he was desirous of enjoying the approbation of his wife's family and friends and, if possible, of rendering her satisfied. He admitted, however, that he did at the time express his regret and that he has always regretted that she, in any instance, has not fulfilled her obligations of honor and truth in giving him the entire income and that, on this occasion, she kept back part of that income and limited the appointment to that of her then property.

That nine or ten days after the deeds had been so exchanged between James Monroe and himself, his wife wrote to him that her referee entirely approved of the arrangement effected; and the more so because he had acted so handsomely in returning a portion of what had been conveyed to him and that she herself would abide by it literally. Notwithstanding all which, when he came to town to reside with his wife, he found she had left their home and gone to live with one of her brothers: giving it out that she would not live with her husband so long as he retained

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the deed prepared, executed and delivered to him, even under all the above recited sanctions. That he, thereupon, made use of all the arguments and persuasion in his power and availed himself of the intercession of her own friends, to the utmost, to induce her to return to her duties and reside with him. But finding it all in vain, he made the following endorsement on the deed :

*" Know all Men by these presents, That I, HENRY D. CRUGER, for divers good causes and considerations me thereto moving, do hereby cancel and surrender this deed and release and relinquish all right, claim and interest under and by virtue of the same. Witness my hand and seal, at the city of Washington this 22d day of February, 1840.*

(Signed) HENRY D. CRUGER. [L. S.]

Sealed and delivered in presence of

FRANCIS STOUGHTON,

JOHN BARD,

JAMES MONROE."

And thus, for the fifth time, he gave up the whole income ; and, although thrown out of his profession and connexions in business, by his wife's treacherous conduct, he went forth penniless into the world afresh, to earn that honorable independence he had always enjoyed before marriage through his own exertions and to obtain the means of supporting her apart from her own property and to pay off the liabilities he had incurred to her estate as above mentioned ; intending, whenever he had it in his power, to offer her a home, to invite her to enjoy, with him, all the rights and considerations due to a wife by the feelings of nature and the laws of our country, regardless of birthright, hard earnings or collateral heirs. He next shows, that, although the only obstacle she pretended to be in the way of living with her husband was thus removed, by his cancelling and returning the deed, as above stated, yet his wife never came near him, nor made any arrangements for their living together. On the contrary she not only, by her course towards him, exposed him to all manner of suspicions and slanders, but busied herself to injure him by all the means in her power ; and, with this view, entered into a correspondence with his brother-in-law, Gen'l James Hamilton, with whom he was

then residing in Charleston, South Carolina; in the course of which correspondence, however, she wrote to said Hamilton, on March 14th, 1840, as follows:

"At present, I will confine myself to giving you the explicit answer you want for the question you propound; and to informing you of how I am acting and mean to act, under the annulled deed. This I wished to do, the moment it was returned; but my sister advised me to give it a little more consideration. You say 'he has, with a liberality and magnanimity which few men, under similar circumstances, would have practised, given up a legal claim, guaranteed by the solemn sanction of a deed, to the whole income of your estate.' Now, sir, when the time arrives, that this magnanimous act puts the income again in my power, which cannot be till the debt due the younger children and the one I claim as trustee to my sister's estate, are paid, I intend to order it paid to Mr. Cruger: and, he refusing, it shall be offered to any other member of Mr. C.'s family who will take it. For I will not touch a dollar of it again, nor have I done so since I gave the deed: living on money borrowed from the remainder of my sister Margaret's estate, undivided, secured by a mortgage on this house."

That whilst remaining in Charleston, arranging his plans with the advice of his friends, either to emigrate or to establish himself in some business, information was received that, in consequence of his wife's separating herself from him and his having left New York, all sorts of injurious reports and suspicions were afloat concerning him; such as, that he had squandered all his wife's fortune—that he had gone off with a large amount of it in his possession—that he had been unfaithful to her and had ill-treated her. All which were utterly untrue. That he came back to the city of New York in June, 1840, prepared to re-unite himself to his wife. But, on his arrival, found that instead of waiting for him, she had, to avoid him, gone off shortly before to her country residence—where she remained apart from him and without his consent during the summer. Thereupon he occupied himself in refuting the misconceptions and suspicions he found rife in relation to his conduct as a married man and in reference to his wife's property. And,

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whilst so engaged, as was natural, the mediation of mutual friends was offered to bring about a re-union between his wife and himself. And, he offered to leave matters to the decision of his wife's sister, Mrs. Monroe, of her cousin, Mrs. Eliza C. Kane, and of her friend and agent William Whetten, Esq.: but she refused her concurrence in such reference and again placed herself in the hands of William Bard, Esq., above mentioned, authorizing him to do as he thought proper.

That Mr. Bard, in consequence thereof, but believing it impossible, from the representations made to him by her, that they could ever live together again—and yet considering that he, the complainant, was entitled to some indemnity, at least, for the serious injury he had sustained in giving up his profession on the faith of the gift to him of the whole income of the estate—had a deed prepared and executed, in the words following:—

“Know all men by these presents, that I, Harriet D. Cruger, the wife of Henry D. Cruger, Esquire, by virtue and in pursuance of the power and authority in that behalf contained in my post-nuptial settlement with him and by virtue and in pursuance of every other power and authority enabling me so to do and for divers good and sufficient causes and considerations me thereto moving, have irrevocably assigned, transferred, limited and appointed and in and by these presents, I do irrevocably assign, transfer, limit and appoint to my said husband, for and during the rest, residue and remainder of his natural life, out of the net income of my separate fortune and estate, a clear and net annuity of three thousand dollars a year, free of all and any abatement and deduction whatsoever, payable quarter-yearly, in four equal instalments; that is to say, on the tenth days of August, November, February and May, in each year—commencing the first instalment immediately upon the execution and delivery of these presents. Which annuity is not to be construed as impairing or in any way affecting any provision which I have made or which, at any time or times hereafter I may make for him, in and by my last will and testament or other instrument of appointment in the nature thereof. And I hereby fully authorize

and empower him, immediately on the receipt of these presents or at any time thereafter and on the tenth day of every November, February, May and August thereafter, to draw at sight on my trustees or the agent of my estate for the time being for the said sum of seven hundred and fifty dollars ; which drafts, so to be drawn by him, I do hereby fully authorize and direct my said trustees or agent for the time being to duly honor and discharge upon sight thereof. And I do hereby assume upon myself the collection of all debts, dues and demands due or belonging to me or to my estate ; and I do hereby fully acquit, exonerate and discharge the said Henry D. Cruger his heirs, executors and administrators of and from all debts, dues, claims and demands now due or owing by him to me or my said trustees or estate and all further or future responsibility or liability touching the same or any parts or part thereof.

In witness whereof I have to these presents set my hand and seal this seventh day of September in the year of our Lord one thousand eight hundred and forty.

(Signed) HARRIET DOUGLAS CRUGER. [L. S.]

Sealed and delivered in presence of

MOSES SHAW.

(Acknowledged before a magistrate in Herkimer County, the seventh day of September, 1840.)

That when this deed was sent to him by Mr. Bard, he returned it to him, with a remonstrance against its going into operation, on the grounds that it was not a fulfilment of his wife's promises, but a departure from truth and moral obligation—that it was a deed for separation and not for union. But, as Mr. Bard declined interfering any further, he consented to receive the said deed, inasmuch as it embodied the principle of making him secure and independent ; and, in the hope that by acquiescing, in such an arrangement even, he would be able to live with his wife and at peace ; he immediately went to her at her residence in Herkimer County—and this, the sole, real obstacle in the case, being adjusted all other difficulties vanished—and they were re-united and returned and took up their residence together in the city of New York for the winter.

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That, being thus limited to but about one-fifth of the income, immediately on his return to the city he re-opened his office and resumed the practice of his profession, which he has assiduously followed to the present time ; attending diligently to whatever business had been entrusted to him, in the sincere desire to increase his means. But in this he had, as he was apprehensive, failed almost entirely ; both because he had been out of business for so long a time and because, as the community cannot comprehend why his wife should be locking up her large property or keeping it for heirs who do not need it from a husband who does and against whom she has nothing to allege, they cannot be made to believe that he is in any want of their custom. He next showed that, under this division of the income, his wife received and disposed of the rest of it as she pleased and often in large sums against his advice and approbation. And, although she would not live with him, while the arrangement made between him and the aforesaid James Monroe, by which he was entitled to one-half of it, was in existence, yet, when his share was reduced to a fifth, she was content to do so ; and they resided together, for a period of ten months and upwards harmoniously and as a man and wife should do. During which time she never, even by a revocable order, authorized him to receive anything beyond what the last deed of appointment gave him, notwithstanding all her avowals, protestations and pledges that he was to have the whole income and that she never would take any part of it back nor use a dollar of it herself, except as derived through him as her husband. Nevertheless, he neither interfered nor complained under what he could not but consider as wrong in her and disparaging to himself, but continued the pursuit of his business and the discharge of the duties of life, faithfully and conscientiously, wishing to make any pecuniary sacrifice in the hope of living with his wife in harmony. That, during the continuance of this state of things, doubts having arisen on the subject of his wife's power of making a will which would be a valid disposition of the income arising from her real estate and from the portion she was entitled to in her mother's property the said will, made as hereinbefore stated,

was submitted to her solicitor, George W. Strong, Esq., who gave it as his opinion that the bequest to him of the income from the real estate was void ; and that, although she had the power of giving the principal of what she was entitled to under her mother's will to him, she could not, by the terms of that will, dispose of the income of such portion in favor of any one. That, on reading this opinion, his wife appended to it the following remarks, in her own handwriting and signed by her and delivered the same to him as declaratory of her intentions, as they had always and still existed :

"New York, 29th January, 1841.

It seems, by the above opinion, that the intention of my whole life, namely, that 'my husband should enjoy, to the end of his life, the entire income of my estate,' would have been defeated, by complying with that husband's wish to have his settlement post-nuptial, if I had died before the accidental discovery of the danger—I say danger only, because I think my brothers and my sister would never have interfered with the letter of such intention—when they know so well its spirit, for all the years of my life, since I was fifteen. Now, recommending him to this knowledge, I believe I must leave him to the stead of his caution, ante-nuptial. My mother's will authorizes me to dispose of the capital of my share of the property : but my own will, as above declared, forbids my availing myself of this authority, except in favor of her descendants ; and their respect for my loyal wish that the one who had stood in that relation towards me, should, as my other self, enjoy, with me and after me, all the part of my mother's estate or any estate I consider belongs to any one, namely, the *income*, I must submit ; and not defeat her intention. George, William and Betsey Mary Douglas will never institute against my husband for taking the whole benefit I wished to leave that husband. Their wives or husband may : when he must defend himself ; as we did against uncle James' sons-in-law and George against his brothers-in-law.

(Signed)

HARRIET DOUGLAS CRUGER."

That, while thus living with his wife, of a sudden and

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without any previous mention to him of the subject, by her or her trustees, he was served by Frederick De Peyster, Esquire, then and now agent of the estate, with a copy of an order, signed by the trustees, George and William Douglas, dated March 19th, 1841, requiring him to collect all arrearages of interest upon the bonds and mortgages belonging to the estate and, in case it should become necessary, to foreclose the said mortgages and to collect both principal and interest—the said order having reference to the bonds and mortgages given by the complainant's relations to the estate, as hereinbefore particularized. The said bonds and mortgages were in the complainant's possession and had been so ever since the assignment of them by his wife, in her letter to her sister of November 30th, 1836.

That, when the call upon him was persisted in to deliver them up, all he required, after asserting his right to them, was a written order from his wife; and, immediately upon its being produced, transferred the custody of them. And he submitted that the object for which he parted with the possession of the said bonds and mortgages having failed, the property in them remained in him and they should be re-delivered to him accordingly. The complainant, also, stated that his said wife, of her own accord and voluntarily, executed a deed, a copy whereof is subjoined:

“ Know all men by these presents, that I, Harriet D. Cruger, the wife of Henry D. Cruger, Esquire, by virtue and in pursuance of the power and authority in that behalf contained in my post-nuptial settlement with him and by virtue and in pursuance of every other power and authority enabling me so to do and for divers good and sufficient causes and considerations me thereto moving, have irrevocably assigned, transferred, limited and appointed and, in and by these presents, I do irrevocably assign, transfer, limit and appoint to my said husband, for and during the rest, residue and remainder of his natural life, the one equal half part of the net income of all and singular my separate fortune and estate, both real and personal, commencing on the first day of November instant, inclusive. Which provision hereby made for him by me is not to be construed as impairing or in any way affecting any provision which

I have made or which at any time or times hereafter I may make for him in and by my last will and testament or other instrument of appointment in the nature thereof. But, the provision hereby made is to be accepted by him and is intended by me in lieu of the provision of an annuity of three thousand dollars, which I made for him in and by a certain instrument, executed under my hand and seal the seventh day of September in the year one thousand eight hundred and forty. And I do hereby fully authorize and direct my trustees under the said settlement or the agent for the time being of my estate to pay to the said Henry D. Cruger the said equal half part or moiety of the net income of my said fortune and estate, during the residue of his natural life. And I do hereby assume upon myself the collection of all debts, dues and demands due or belonging to me or my estate. And I do hereby fully acquit, exonerate and discharge the said Henry D. Cruger his heirs, executors and administrators of and from all debts, dues, claims and demands now due or owing by him to me or my said trustees or estate and all further or future responsibility or liability touching the same or any part or parts thereof. In witness whereof I have to these presents, set my hand and seal this nineteenth day of November in the year of our Lord one thousand eight hundred and forty-one.

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(Signed) HARRIET DOUGLAS CRUGER. [L. S.]

Sealed and delivered in presence of (the word "fully" on 1st page, was interlined before execution.)

WM. L. MORRIS,

WM. DOUGLAS,

ELIZA G. DOUGLAS.

(Acknowledged before a commissioner of deeds the twentieth day of November, 1841.)

That, during the summer and fall of 1841, being compelled to remain in town to attend to his business, it was his wish and he requested his wife to stay with him—but she left him and went to the house he had built in Herkimer county and in this, to gratify her, he acquiesced in the first instance. But, on a second occasion, when she had returned

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home, he forbade her leaving him again; notwithstanding which, in the beginning of September she, a second time, departed for the country and had ever since lived apart from him—thus not only holding four-fifths of the income of the estate at her separate disposal, but exempting herself entirely from the authority and personal control of her husband. And it was whilst she was so beyond his influence and when he had not even seen her for a long time that she executed the deed of appointment last above set forth. Which deed was prepared by George W. Strong, Esq., then and for a long time previous the solicitor and confidential adviser of his wife and of her trustees—who, before it was executed, submitted a draft of it to him, who candidly stated his objections to it. But he was informed unless this deed was accepted none other would be executed—and that, on a surrender of the one in his possession, this would be substituted in its place; upon which he consented to receive the latter, and in consideration of its delivery to him, as a valid and complete instrument, he accordingly gave up, in exchange, the one appointing him \$3,000 a year from the income of the estate for life. That, after the existing deed of appointment was delivered to him, he applied to the agent of the estate for a balance sheet, by which he could become informed what the half of the income amounted to. And although he had repeatedly himself and through his solicitors made similar applications to the agent and the trustees, they refused to furnish him with a copy of said accountant's report or to give any information concerning the estate in their charge subject to the operation of the said deed of appointment in his favor.

That although the trustees, through their agent, with the full knowledge and consent of his wife, had, from time to time, during the past twelve months, made payment to him under the deed and had, in various other ways, recognized, acted on and confirmed the same, yet the trustees had recently wholly refused compliance and had repudiated the contract, sometimes pretending that it was void as having been made under a post-nuptial settlement and at others, that it was defective because the trustees were not parties to it

and especially that it was not valid, as having been procured by duress and coercion. All which he denied.

The complainant charged that the present trustees of the estate had been and were wholly regardless of their duty to manage it well and make it as productive as possible; and that there was a large amount of the capital of the estate lying dead or producing inadequate returns and much of its income in arrears and uncollected. And, in particular, he designates:—1st. A large tract of land in the state of Virginia. 2d. Three lots near Fourteenth-street in the city of New York. 3d. The great body of the land in Herkimer county.

But chiefly, that his wife became entitled on the 29th of June, 1840, under the will of her mother, the late Mrs. Margaret Douglas, to an annuity, payable semi-annually, of from 3 to 4,000 dollars a year; which the trustees had hitherto neglected to gather in from the trustees of Mrs. Douglas' estate, although the said estate had at all times been abundantly able to pay it. Also that his wife was entitled to receive from the estate of her late sister, of which she, with the said George and William Douglas, were trustees, a large sum of money amounting to \$10,000 and upwards. And that his wife had a just claim against the said George Douglas, for between 50 and 70,000 dollars, for a disproportion of their uncle's estate, irregularly obtained by him.

That one of the trustees appointed by the complainant in his post-nuptial settlement, Robert Halliday, was dead; another of them, James Monroe, had resigned and been released from the trust; and that the said George and William Douglas were the sole remaining trustees. That the complainant named them originally as such merely out of compliment and expressly created the trust, joint and several, that they might not be, except in the last emergency, called on to act. For that, indeed, they were wholly ignorant of business, and entirely incompetent to perform the duties of trustees; in addition to which, they occupied the incongruous relation of *cestuis que trust* also, inasmuch as their sister, besides making her will to that effect, had uniformly declared that the principal of the estate in their charge, was to be theirs, after the death of herself and husband.

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That after the deed, appointing to him one half of the income, had been delivered to him, as above mentioned, he continued to occupy the house that had always been the residence of his wife and himself in the city of New York, in readiness to receive her, whenever she chose to return home; but that she refused to do so, and persisted in living with one or the other of her brothers. That, upon going to the south in February, 1842, of his own impulse and with the advice of his wife's sister he addressed to her a kind and affectionate letter, which he left in the hands of the Rev'd. W. W. Philips, by whom they were married, urging her to return home and be there to welcome him when he came back. This letter, his wife refused even to receive; notwithstanding which, he, before starting on his return, wrote another letter, addressed to Mrs. Monroe, to be shown to her sister—pointing out the duties of a wife, the serious injuries she was inflicting on him and the sin she was committing herself, and entreating her to be at home to receive him; but it was all in vain. And he, finding that she could not be prevailed upon by any appeals to feeling, to reason or to a sense of duty, determined no longer to live in the house alone and, therefore, notified the trustees of the estate, in due season, that he should not continue to occupy their town residence after the first of May ensuing—and that they might either sell or rent it, as would be most advantageous to the income. In like manner, and for the same purposes and none other, he had given up to them possession of the house in Herkimer county: reserving to himself the right, in each instance, of occupying either or both of them whenever he might think proper, in the event of their not being so disposed of. And holding them, the said trustees, responsible for whatever ought to be the avails to the estate. At the same time that the complainant thus declined to live alone in these houses, he avowed his readiness to occupy them with his wife; declaring that, although he should not compel her to live with him, he never would himself consent to a separation and expressed his decided disapprobation of her residing in them without him; considering it but proper, if she withdrew from his protection, that she should remain under that of one or other of her

brothers. In despite of all which and in defiance of his just authority as her husband, his wife had passed a great part of last summer by herself in the house in the country: and was now living apart from him. That he had at all times been ready to live with his wife, in performance of his duty, faithfully and kindly, according to their marriage contract, the laws of the country and the precepts of their religion; but that she had wilfully and maliciously deserted and perversely and obstinately avoided him and refused to fulfil her matrimonial obligations—thereby depriving him of her society, destroying their home and grievously injuring his feelings, his rights and his character. And he averred and charged that there was no just reason or cause whatsoever why his said wife should be unwilling or refuse to live with him. That he was no party to any deed or contract made subsequently to his cancellation of February 22d, 1840; but had accepted of them or acquiesced in them, whether for a fifth or a half of the income, for the sake of that union and harmony which he had not found in return.

That he had been advised by his counsel that the post-nuptial settlement, hereinbefore set forth and therefore insisted, that said post-nuptial settlement was wholly void and repugnant to the revised statutes of the state of New York and of no force or effect upon his rights as the husband of the said Harriet D. Cruger; and that he was entitled, as such husband, to the full and entire possession, control and ownership of all the personal estate in any manner owned or claimed by the said Harriet D. Cruger and also of all the income, rents and profits in any manner arising out of the real estate of which the said Harriet D. Cruger was seized or possessed or of which the said George Douglas and William Douglas, as such trustees as aforesaid or otherwise were seised or possessed for the use and in the right of the said Harriet D. Cruger.

That there were in the possession of his said wife various letters written by her to him at sundry times; and also many other papers and documents, which were delivered to him and which were afterwards loaned to her, under the express promise by her that the same should be returned. That there were also in the possession of the complainant's

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wife many other letters, papers and documents which were or might become material to the matters in controversy. That he could not particularly enumerate the said letters: but that, among the said papers and documents, were the two wills made by her, the one on July, 24th, 1833, and the other on February 14th, 1834; the note, order or memorandum in writing delivered to James Monroe, as aforesaid, on 26th October; and the deed of appointment bearing date November 2d, 1839; the opinion given by George W. Strong, Esq., with the note or remarks endorsed thereon by the complainant's said wife bearing date January 29th, 1841; the letter of William Bard, Esq. to Captain John Whetten dated November 27th, 1836: all of which the complainant submitted should be produced or accounted for and such of them as were his property restored. And that he had also frequently and in a friendly manner applied to the said George Douglas and William Douglas to render an account of all the estate, real and personal, whereof they had charge, as such trustees as aforesaid, and of the rents, profits and income thereof; and to pay him over such portion thereof and let him into the enjoyment of such parts as by the deed of appointment thereinbefore last recited he was entitled to, being the one-half or moiety thereof.

*Prayer* : That an account be decreed to be taken of the said trust estate; and of what the same was now composed. And that an account might also be decreed to be taken of the personal estate; and that, whatever balance should be found due, might be decreed to be paid to the said complainant.

And that the said post-nuptial settlement be decreed to be void and insufficient to bar the rights of the complainant to the free and entire possession, control and enjoyment of all the personal property belonging to the said Harriet D. Cruger, as well such personal property as was owned by her, at the time of her said marriage, as aforesaid, as all other personal property since acquired by her, by increase or otherwise, whether standing in her name or in the names of her trustees, for her use and benefit, or in the name of any other person whatsoever, for her use and subject to her control. And that, if the court should deem said post-nuptial settlement to be good in part and void in part, then that this court

might decree that said settlement be thenceforth null in such parts as to the court the same should seem invalid and objectionable ; and that he be restored to all his rights, as the husband of said Harriet D. Cruger, in all such portions of the property of said Harriet D. Cruger as were not affected or controlled by said settlement.

And that the said George Douglas and William Douglas, acting as trustees under the said settlement, be enjoined from further interfering with said property and be decreed to account.

And that the said George Douglas and William Douglas let the complainant into the possession and enjoyment of the real estate belonging to the said Harriet D. Cruger.

And that the trustees of the estate might also be enjoined and restrained from proceeding, in any way, to collect the debts contracted to the said estate, as hereinbefore stated, by the complainant's relatives or by himself on their account. And that the said trustees be decreed to assign the said bonds and mortgages to him in due form.

That in case the said trustees, in the opinion of the court, should have full power and authority, under the post-nuptial settlement as aforesaid, to act as such trustees, that they be directed and required forthwith to proceed to demand and recover from the said George Douglas the property in his hands belonging to the complainant's wife—and that they collect in the same with all due diligence and invest it ; and that they be decreed to convert all of the principal into productive property and to manage the same so as to yield the most income ; and pay whatever arrearages of the income of the said estate might be outstanding. And that a receiver be appointed. And that the said George Douglas and William Douglas might be enjoined from collecting, &c. And that the said George Douglas and William Douglas might be removed from being trustees, under the said marriage settlement. And for further relief.

The defendants, Mrs. Cruger and George and William Douglas put in a joint and several answer. It admitted the marriage.

The defendant, Harriet D. Cruger, denied that the complainant, on his said marriage, became entitled to or was in-

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The said defendant, Harriet D. Cruger, further answering said, that previously to her acquaintance with the complainant and in obedience to the opinions of her parents, now deceased, she formed a resolution to keep secured, in any event, to her own use, during her life, the income of her whole estate; and to transmit the principal thereof unimpaired to her next of kin and heirs at law; and never, freely or willingly, departed therefrom in any particular. That prior to any offer of marriage the said complainant and this defendant had conversed concerning the practice of settling the fortunes of married women to their own separate use; and, in such conversations, the complainant expressed great aversion to such practice and asserted that the husband ought always to possess an absolute control over the wife's property. That the said complainant, in the year 1823, made to the defendant a proposal of marriage, which she, for the time, declined; and assigned, as one reason, his opinions in relation to the settlement of the fortunes of married women. That in the year 1826, the said complainant made another proposal of marriage; and in making such proposal, amongst other things, addressed to this defendant, in writing, the following language: "Nor do I know or have I ever inquired what property you may be possessed of or how it is situated; and I should be most reluctant to forego my present independence, with no other expectation than to exchange it for a dependence upon that property, be it much or little; which, though I might wish it to be placed beyond the reach of misfortune, I could not brook to be beyond the pale of my control; since I should deem myself competent to its charge, if esteemed by others worthy to be entrusted with your person and your happiness." And this defendant finding, by the terms of such last mentioned proposition, that the complainant's said opinions were unchanged, she returned an unequivocal rejection. That within a very short time after such last mentioned proposal, she departed on a visit to Europe. That whilst she was absent in Europe, the said complainant visited her in Scotland, England and France. And that, on those occasions, he renewed his said proposals

of marriage. That this defendant steadily adhered to her said resolutions—and, in the most express and distinct language, announced her fixed determination never to contract matrimony with the said complainant, unless on the condition of her whole estate being duly settled to her own use in such manner as to exclude a husband from acquiring any right over any part thereof or any of the income thereof. That at the city of London, upon an evening in the month of November, 1829, the complainant did, whilst in company with this defendant and several other persons, privately place in the hand of this defendant a small piece of paper, on which was endorsed in pencil writing, "I live for your happiness:" and within which was written, in pencil, the following words, "The property to be conveyed to trustees. The income for the joint use of the parties and of the survivor. The principal for their children; the eldest son to bear the surname of Douglas."

That the said pencil writing produced a renewal of discussion, whereupon this defendant expressed to the said complainant her entire dissent from the kind of settlement, in case of a marriage between him and this defendant, suggested in said pencil writing.

That such discussions were from time to time still continued, until the said complainant, in London, in or about June, 1839, expressly relinquished his said objection to a settlement of this defendant's estate and income to her separate use; and agreed that that point should be deemed settled and at rest and that, in case this defendant would marry him, all the property of this defendant, real and personal, and all income thereof, should be vested in trustees, in such manner as the laws of the state of New York required and permitted and as counsel should reasonably advise for securing the whole principal and income to the separate use of this defendant, during such expected coverture, free from any control or interference of the said complainant and excluding him from acquiring any right, title or interest in any part thereof or of the income; and that she should be vested, notwithstanding such coverture, with the fullest powers of control and disposition. That, at the time of making such agreement, he observed that his sole objection to such settle-

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ment was his repugnance to admit himself to be unworthy of confidence ; that if the settlement to be executed should be executed before marriage, it would be published to all who might see it on record ; that full confidence had not been reposed in him ; and he, the said complainant, therefore, requested this defendant to consent that the formal instrument required to make such settlement effectual might be executed after and not prior to such marriage. And she acquiesced in such request—stating, at the same time, that although she was willing that the said settlement should be made in the manner most agreeable to his feelings, yet, she would expect it to be made in a proper, legal and binding way.

That, in several conversations subsequently and prior to the said marriage, the same agreement was, in general terms, recognized by him as the basis of his suit for the hand of this defendant. And the same continued to be in full force at the time of such marriage ; and had never since been cancelled or rescinded. That the said complainant obtained the consent of this defendant to the marriage on the express condition that such agreement should be observed and performed by him. And she assented to the marriage in full reliance on such agreement and in performance thereof on her part. That almost immediately after the marriage ceremony had been performed, Mr. Robert Halliday, now deceased, announced to this defendant that the said complainant was about to execute a settlement of her property to her separate use—and invited this defendant into the next room to hear it read. And immediately thereafter the said complainant read over to this defendant the said deed of marriage settlement, bearing date June 29th, 1833, in the said bill of complaint set forth and delivered the same to one of the said trustees then present. That she was not surprised at the making of such deed of marriage settlement, as in said bill untruly suggested ; although she was somewhat surprised at the time and place selected for the making thereof. She denied that she did, on that day or evening, verbally or otherwise, give to the said complainant the entire income of her estate for life or any part of such income or anything else whatever ; or specially or otherwise call two of the said trustees or any person or persons whomsoever to witness

any such gift, or any gift whatever, from this defendant to the said complainant. And she wholly and absolutely denied the allegation in said bill contained touching the gift therein alleged to have been made by her to the said complainant in return for such settlement deed. But she said that after the said deed was executed, she, then and there, did request the said Robert Halliday, James Monroe and other persons then present, to bear witness to her declaration that if she should die that night or before having an opportunity to make a will, it was her will that the said complainant should enjoy the income of her property during his life. And that she did not, on that evening, make or intend to make any gift or disposition in favor of the said complainant, other than a verbal or nuncupative last will, to take effect at her death in case he should survive her; and she then and long before well knew that wills were revocable; and that she used that revocable form of disposition in conformity with her said long previously conceived determination not to give to her husband any right or title to her property as long as she lived.

And this defendant denied that the said complainant named the said George and William Douglas as trustees out of compliment or otherwise—for she herself named her said brothers to the said complainant to be such trustees.

That the said order on Robert Halliday dated "Bloomington, 15th July, 1833," was signed under the following circumstances, that is to say: the said complainant stated to this defendant that there was some inconvenience in the then existing state of things; for that this defendant, being a married woman, could not give a check for money and that he, having made a settlement on this defendant, could not give one. This defendant inquired how this inconvenience could be obviated and the said complainant suggested that this defendant should give him an order on her said trustees named in said marriage settlement, to the end that he might receive the income of her estate and pay it out as might be required. That it was her desire that her husband should have the disbursement of her income, but subject to her said separate rights; and, therefore, she at once acquiesced and proceeded to draw an order accordingly;

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but not understanding precisely how to frame the same, her said husband came to her aid and wrote the said order down to and including the word "receipt," in duplicate, one for himself to keep and one to be left with the said Robert Halliday; whereupon this defendant added the subsequent words and subscribed it.

She denied that the said order was an irrevocable order or appointment or that the same was in fulfilment or confirmation of an alleged gift; on the contrary that the same order was applied for and given merely as a temporary direction to the said Robert Halliday, as the agent and acting trustee and for the purpose of supplying her said husband with means of disbursing the income as received in such manner as the uses of this defendant might require: she intending to conform herself, as far as reasonably possible, in all things, to the pleasure of her said husband. But she did not intend; nor did her said husband, when obtaining the same order, intimate in any way that the same was or should be irrevocable. And if it was so irrevocable in strictness of law and was intended to be relied on as such by her said husband at that time, then she, this defendant, said that her said husband, in obtaining the same, took an unfair and undue advantage of her ignorance and confidence in him; and that the same order was therefore fraudulent and void.

That, under the impulse of affection and in pursuance of her good intentions but not under any sense of obligation nor believing or supposing that any will or appointment in the nature of a will which she might make would be irrevocable, she, shortly after the giving of such order, requested the complainant to write a will for her; and he accordingly drew a will to the purport stated in the said bill and bearing date July 24th, 1833, which this defendant duly executed and delivered it to the said complainant for safe keeping. And she admitted that the said order on the said Robert Halliday and the said last will were left in the hands of this defendant, by the said complainant, on his departure for Scotland. That the said complainant did, during his said absence, write a letter, bearing date at Edinburgh in Scotland, September 29th, 1834. That the following extracts therefrom contain, according to the best judgment of

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this defendant, the nearest approach to the sense imputed to said letter in the said bill of complaint, to wit: "My mind will never be perfectly at ease until assured, beyond the reach of all casualties, that at no period of my existence, upon no contingency, however remote or improbable, shall I become indebted, without the power of requital, to others, for the means of a gentlemanly subsistence." Again, "It is time now that I should choose a settled mode of life, neither my temper or my convictions, my pride or my confirmed habits will allow of this being left to chance or the government of circumstances—nor will they admit of any plan of which idleness, frivolity or insignificance are to be the characteristics. On my return home, measures must be definitely taken for me to commence the career of a professional man, a public character or a private citizen. The decision must be upon full deliberation. Deeply concerned, you are called to the counsel;—be it my part to lay before you, in fitting, business-like though perhaps chilling manner, all the circumstances that need be weighed to strike the balance; and yours to con them over hourly from this moment until your hand is again in mine to help me on in the path you choose.

"Consistently with that longing after independence I have related, my situation admits of but one pursuit—that of the law. If this is to be my course, the first step on my return, should be the removal of my office to the business part of the city; and then my mode of life would be thus: To breakfast at eight, and be at my desk at nine punctually—and as the clock struck three, start for home, the dinner being served while on my way. Returning at four, my stay in the afternoon would be until dark always, and frequently until ten at night. I should decline all invitations, make no visits, and resort to no place of public amusement: but be indeed what I professed to be, a man of business. The great competition in New York, my newness there, and indeed my marriage itself would all impose this assiduity and self-denial upon me. It is not a life of pleasure or perhaps of happiness, and has little to invite but stern principles. I, however, have done it—and although now surrounded with temptations, especially of your society, greater than formerly,



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"I trust that my resolution to do that which is right would not fail me. The reward would not be distinction at the bar, for princes are not the competitors : but it would enable me, in the course of about ten years, besides supporting myself and helping others, to acquire property enough to insure an income of twelve hundred dollars a year, and that would place me beyond all chance of ever standing in need of foreign aid." Again,

"Before leaving New York, I placed in your hands three papers, with a request that you would look them over. The first was the order upon your trustee to pay to me the income of your estate as it accrued. The purpose of returning you this, was, that you might, if you choose, revoke the stewardship. It was accompanied with one requisition which made it irksome—that of a minute accounting for all expenditures. Of the policy even of such reckoning, I have ever had my doubts. In one's own case, besides the incessant loss of time, trouble and perplexity it occasions, I know of no motive for it, except that we doubt our own good purposes in spending and so keep up this frail check ; with regard to others, it directly conveys the imputation that they may misapply our money. For the purposes of real economy, it is enough that we previously determine upon the amount of our annual disbursements, whether it be the limit of our income or any thing short of it—and then, by memoranda of large payments, and a periodical general computation of current expenses, see that we keep within it. But to worry for an hour over confused pencil marks or petty accounts, for the price of a turnip or a piece of tape, is decidedly bad economy ; for, the same time applied to earning money would answer ten times as well—and the worst of the practice is, that it becomes a superstition and an inveterate habit. It was melancholy to see the piles of account books my poor father left, containing the most scrupulously minute entries of daily expenses, his princely estates 'running to ruin the while.' You proposed, at one time, to give me the whole of your share of your sister Margaret's estate,—then the income of it—and latterly, four-fifths of the income, to be disposed of by me, without accounting for it to you. This implies that for the rest of your income, rigid and detailed accounts

"are to be rendered ; and further, that there may be uses of the money I might wish to conceal from you. There are none such : Heaven forbid there ever should be. I have no vicious tastes to gratify, and no sinister purposes to subserve. Neither of my own, nor of your money, shall I ever wish to spend any, without your knowledge and approbation. Take away this poignard of ice from between us—it is brittle, but it is cold. It portends that you and I are not one, and curdles the confidence that should flow to and fro. I desire no interests separate from yours, for I love you, and we are married. Although accounting in detail be irksome and humiliating, yet, I wish for the use of no part of your property that shall be unknown, and so the fruitful source of suspicion to yourself." Again : "The last of these important papers was your will : as far as delicacy would permit, I had before intimated to you my wish to have it executed anew. You will remember it was but a rough draft, intended to be engrossed in your own hand writing, which I had prepared at your instance. My reason for wishing it altered was, that the manuscript was mine. The credit of the act I desired to be wholly yours : whereas, remaining in my hand-writing, it would bear the appearance of importunity or dictation on my part—both of which, I aver, are foreign to my nature. That the instrument was defectively executed, was a suggestion of Mr. Halliday's, of his own accord. When appealed to, I confirmed his objection. You declared you would make a new one, or if you did not, that your brothers and sister would never dispute it, that would depend not upon them, but upon the decision of the law, and the duty of executors ; or even were they to assent, I should not, perhaps, be willing to receive from their forbearance what I might be willing to accept from your affection. Under any circumstances, a will is the most unstable of all things ; a new one may be made every day or every hour in one's life ; but when we superadd doubts of its validity, its provisions are the last dependencies we should ever look forward to. When we meet again, tell me directly that yours is destroyed and I shall be better satisfied than under a knowledge that it subsists as my autograph or your imperfect design ; and I will take my measures for life accordingly.

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"Reflect well and dispassionately on all I have said, and when your mind is maturely made up, do whatever you conclude, ere I get back, perfectly, completely, and may the God of Heaven vouchsafe to your acts all the happy results desired by a love such as that of your

"HUSBAND AND FRIEND."

He, the said complainant, in the said letter, also, uses the following language, to wit: "My repugnance was alone to sign any document proclaiming to the world a doubt of my honest affection before marriage or of my honorable conduct afterwards. Little, however, did I expect this instrument to be singled out for suspicion. I know it to be all-sufficient and done in the best faith; but now, in addition to the explanations heretofore given, I can do no more than tender the inclosed means of dispelling all doubt."

That within the said letter of September 29th, 1834, there was enclosed a letter in the proper hand-writing of the said complainant, in the words and figures following, to wit:

"EDINBURGH, 29th Sept., 1834.—*To Robert Halliday, Esq.* Dear Sir: Understanding that doubts have been entertained as to the comprehensiveness of the post-nuptial settlement I executed of Mrs. Cruger's property, I conceive it to be your duty, as it certainly is my desire, that another be drawn out with every formality of the law, to quiet all misgivings, so that I may execute it immediately on landing again in New York. Very sincerely, yours, &c.

"H. N. CRUGER, Jr."

That the said complainant, whilst thus absent, also sent to this defendant a paper purporting to be a journal of reflections and events occurring at sea on his voyage to Europe, in his own hand-writing, in the form of a letter to this defendant: in which, under the date of May 14th, in the year last aforesaid, the said complainant, referring to the said deed of settlement, used the following language:

"And now to extract a thorn in my side. You have asked me often to speak out and not be calm and silent: and if the thoughts do come, it perhaps is best you should know them. As I shall never ask for that confidence which your generosity might bestow or my character entitle me

"to or which may be due to the identity of interests and intimate relation existing between us, so I shall ever feel keenly sensitive to anything that has a contrary look. Perhaps the explanation I gave you a day or two before coming away, as to the words you pointed out in the settlement of your property, as it was brief and hasty, may not have proved entirely conclusive and satisfactory. The words were, 'so that she may enjoy and dispose of the same, as it came from her parents and sister or may hereafter in any manner accrue to her;' and the doubt was, whether the specification of 'parents and sister' might not restrain the generality of the other words, so as to exclude any other property heretofore acquired in a different manner—as, for instance, from your uncle. Of course, the question could not embrace anything hereafter to accrue, for the terms expressly include such acquisition, made "in any manner." Then as to the property you have hitherto received from your uncle, being the only property you have received, seemingly, from any other source than your 'parents and sister.' In legal construction, you have derived even this from your parents, for it came to you in right of your father and through him solely by the terms of your uncle's trust settlement. But again, the rule of construing a legal instrument is that all the parts are to be taken together to determine the meaning of the maker and not an isolated sentence. Now, in the beginning of the paper, I had 'freely, fully and unreservedly restored to you all the estate theretofore owned by you or which you might thereafter acquire;' and such language, I conceive, conveys, most strongly, what certainly was my intention, a total abdication of all interest or right in your property, in possession or expectancy whencesoever derived or howsoever situated. And I can only add, that I shall be prompt, at any time and in any manner, upon the slightest suggestion, to make your property, if possible, more secure for 'heirs you know not whom,' or for those who are already sure of a pernicious superabundance; trusting, as of course, they must be nearer and dearer to you than I am, so also that they will make a better use of it (which alone makes it worth preserving,)

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"than I should—at least as good a use as George is making of his."

And this defendant, further answering, said, that she did address to the said complainant a letter, dated July 16, 1834, in reply to the said Journal at sea; and which was her first letter after he left said order and will in her possession. And she admitted that she did in such letter use the words "the interest of all my property you shall have as long as you live," as mentioned in the said bill; but she said that the true intent and meaning of these words were, by the other matters in said letter, fully explained and shown to be, that he by living with her, would actually enjoy the said income, although he would have no legal or equitable ownership thereof. That, among other things, the last mentioned letter contained the following matter: "I came to the part you call taking a thorn from your side. And I read the feeling that had been rankling in your breast since I spoke to you of a sentence in the marriage settlement: and I read on without pain or misunderstanding of what you wished me to do, your fuller explanation of that sentence and declaration of being ready at any time and in any manner to make my property, if possible, more secure; but why did you end this last thus: 'for heirs you know not whom,' or 'for those who are already sure of a pernicious superabundance trusting, as of course, they must be nearer and dearer to you than I am, so also, that they will make a better use of it than I should or, at least, as good a use as George is making of his.' Oh! how this and what followed changed the spirit of my dream." Again—"Mr. Halliday was the author of the doubt on that sentence, though he forbid me to mention his name: but I thought I had done so. I have no suspicions of you; no want of confidence, so help me Heaven. My marriage settlement was such as I had *always* resolved it should be, a security of the abstract rights my parents had left me: which I think I have no right to alienate or you to wish me to do than taking the eyes out of my head and give them to you literally, because I had committed my person to you."

That such last mentioned letter was extorted from her,

by the indications of dissatisfaction on the part of the said complainant referred to in such letter and by a consequent apprehension that his affections were becoming alienated from her. She, therefore, insisted that her said letter could not be justly regarded as a free and voluntary gift of the income or of any part thereof. That the said complainant returned to New York, December 6th, 1834 and having, on his own request, received the said order from this defendant, proceeded as before in the receipt and disbursement of the income of this defendant's property. That afterwards and on February 14th, 1835, she, at the special instance and request of the said complainant, copied her said will of July, 1833, except as to the date and executed the same copy in due form of law, as her last will and testament, in the presence of three attesting witnesses. She denied that the said wills were or that either of them was executed in pursuance of any agreement. That the first and the latter were the expression of this defendant's will and pleasure that in case her said husband should survive her, this defendant, he should, from and after her death, enjoy the income of her said property, so far at least as any will which she could execute was adequate to give him that right. And this is her present will; and she has no present intention of ever revoking the same. That in the year 1835, shortly prior to and in anticipation of the usual annual settlement of her estate, on the twenty-ninth day of June, that being the anniversary of her birth and marriage, the said Robert Halliday, as acting trustee of her said estate, announced that the sums drawn from him by the said complainant, had exceeded the income of this defendant's said estate and enroached on the capital many thousand of dollars; that, thereupon, the said complainant entered upon the examination of the accounts of said estate and so stated the same as to reduce the said excess to \$2,785 22. And this defendant admitted that the said complainant, on that occasion, did pay to the said trustees such last mentioned sum of money and also \$1,080 60, being for principal and interest of money lent by her said trustees on bond and mortgage without her knowledge and consent, but by direction of said complainant to Henry N. Cruger, the uncle of the said

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complainant: all of which was done to make good the capital of her said estate. And, also, admitted that the said complainant repaid to William Douglas \$1,000, theretofore borrowed by the said complainant. But she denied that the \$1,000 borrowed from the said William Douglas or any part thereof was applied for the purchase of horses for her use although she admitted that she had some use of the horses which were purchased therewith, by the complainant. And this defendant had no reason to believe, did not believe and, therefore, denied that the said payments by the said complainant or any of them or any part thereof were or was made by the said complainant in consideration of or on the faith of his having the whole income of her estate for life or any part of such income. That during the time that such adjustment of accounts was progressing, the said complainant evinced great dissatisfaction at being thus obliged, as he considered it, to state minute and particular accounts of the moneys disbursed by him and made this defendant very unhappy by his conduct, absenting himself from her society and complaining of the labor so imposed on him and of this defendant's want of confidence. That he, again, during such absences, presented to this defendant a view of the sufferings which would result to her from his applying himself to business; that among other intimations to that effect, he, said complainant, on the nineteenth day of June, in the year last aforesaid, addressed to this defendant, at Staten Island, (Richmond County,) where she was then residing, a letter containing the following matter: "You know my reasons for not coming to Staten Island—and if this much is irksome to you, how would you bear the pre-occupation and absence of a regular man of business? Whatever you wish me to be—whatever may conduce most to your happiness—choose for yourself and you have the proud satisfaction of knowing that want of capacity on my part does not prevent; but when your choice is made, let there be no half way measures and no repinings, for they would be unworthy on each side." And whilst such accounts were being examined, the said complainant urged this defendant to write a letter to the said trustees other than said Halliday, inquiring of them whether they

had accepted their said appointment and, in that event, requiring them to take an active part in the management of her said estate, in order to preserve it from injury ; and, on her declining so to do, the said complainant himself addressed to them a letter, dated the second day of May in the year last aforesaid, containing the latter request and, also, the following matter : "Doubts having been entertained of the sufficiency of the post-nuptial settlement, drawn up by me, the first subject for your consideration will be the expediency of having another prepared and I shall be ready to execute it in whatever terms it may be couched."

That the said complainant, for the purpose, as she believes and charges, of vexing and annoying her and thereby forcing her to settle upon him her income or some part thereof, did, on the thirteenth day of June in the year last aforesaid, send to this defendant and her sister, Mrs. James Munroe, some business letters which had been received from Europe and a letter from himself, in the following words :

NEW YORK, 13 June, '35.

*To Mrs. Cruger and Mrs. Munroe :*

"I wish you, dear ladies, to take the accompanying letters into consideration, in connection with those previously received, in order to determine whether your family should send an agent out to Edinbro' to represent them, on the approaching final settlement of your uncle's estate.

"Should you determine affirmatively, I shall be glad to be preferred to the office.

"My object in going would be to earn for myself a little money ; for I desire to be out of debt, and should like before I die, to enjoy the feeling of absolute independence and gratify the natural craving of the human breast to be the possessor of some property.

"This being the motive, of course there would be an impropriety in my expressing an opinion as to the expediency of your employing an agent, and I must refer it to your family councils exclusively. You will, I trust, pardon my suggestion however, that a decision should be soon made.

"The suffering I shall have to undergo, and the sacrifices I must make, are but a part of the condition of a poor man ;

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"and I beg of you to regard it but in one point of view—a means of bettering me in pecuniary circumstances.

"Your friend indeed,

H. D. CRUGER."

That about the same time, this defendant received from the hands of the said complainant, or in an envelope, the said order for her income. That, although as yet fully determined not to give to said complainant the legal right to her income, she was very willing to render the manner of its receipt and disbursement agreeable to him: and, therefore, and for no other cause and not with any view to confirm any former order or make an irrevocable appointment in respect to her said income, she gave to the said complainant the paper dated June 29th, 1835, in the said bill mentioned. But the said paper was given whilst she was in great distress of mind from the said annoyances and his manifestations of anger and discontent; and that the same was in fact extorted from her by the said complainant, by means of his murmurings, neglects and unkindnesses; and that the only difference which the same paper was understood to make or did make, in respect to the receipt of the said income by the said complainant, was to relieve him from the necessity of keeping minute accounts and to permit him to spend, without regard to this defendant's wishes, a portion of the income from her sister Margaret's estate and to allow a general method of accounting to this defendant when she should see fit to require accounts.

That she did not recall her said order from her said trustees without notice to the complainant, but in July, 1836, she withdrew the agency of her estate from Halliday and appointed Francis Brown as agent; and upon the same occasion she also withdrew from the hands of the said Halliday his duplicate of the said order. That she did not give the complainant any prior notice of such change; but she did notify him thereof and of the causes thereof immediately after such change was made by a letter bearing date July 27th, 1836: being the same letter of that date incorrectly stated to have been written in the course of a long correspondence on that subject. That the said complainant, on receiving such notice from this defendant, became greatly ex-

cited and addressed to this defendant a letter, in the following words: "29th July, 1836. Instead of yourself, my dear Harriet, to welcome me last evening, as I had eagerly expected, I found your letter of the day before, which has well nigh turned me out of your house. God in his mercy forgive you for the agony and humiliation it is inflicting on me, whose bosom was fraught with the kindest thoughts and purposes toward you. Not for three times your whole fortune, dedicated to the best and wisest uses, would I have made even a stranger suffer so much as I am now undergoing. Until Monday morning I will wait for you either to confirm or recall that letter: and, in the meantime, shall neither act or decide upon its contents. But merely for your own sake, solemnly urge you to consider well for *what* it is you are on the brink of sacrificing your own respectability and happiness and that of your unoffending and still devotedly attached husband,

HENRY D. CRUGER."

That the said complainant, on the said Monday, left the house of this defendant and went to board with a Mrs. Forest, in the upper part of the city—and gave this defendant notice that he had done so because she would not revoke her said determination to economise in her expenditures; incorrectly alleging that it was a measure of self-respect and an effectual compliance with this defendant's wishes. And the said complainant not only invited this defendant to go and reside with him, at his said lodgings, but insisted that she was bound so to do. That the said complainant, whilst so boarding at said Mrs. Forest's, stated that he was about resuming the practice of the law; and was constantly addressing to this defendant letters relative to her property. That being much distressed, she requested William Bard, Esq., to call on the said complainant and explain to him the unreasonableness of his said conduct—and endeavored to persuade him to return to his home. That upon that occasion the said complainant addressed a letter on the subject to the said James Munroe, then one of her trustees, urging the necessity of having his said accounts of the disbursement of this defendant's income settled and approved, and concluding this—"With my accounts settled, then the order to her trustees made unchangeable and with-

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"out accountability, and the appointment of myself as her agent, I believe we can again be united and permanently happy. Until the first requisite is complied with, we must remain apart; and without the other two, I can but say she is welcome to a full share of all I can earn by my industry." That she refused to yield to his requisitions, except as to settling accounts; upon which the said complainant addressed her a letter in the following words:

SUNDAY NIGHT, 7 Aug. '35.

"*My Dear Harriet*:—My uncle informed me last evening, with deep distress, that his mediation had been in vain, as you refused to do anything unless I 'would return to you and trust to your confidence and affection.' He also expressed the opinion that our friends could be of no use or anything be accomplished unless we came together in a spirit of mutual concession.

"Through the long hours of a sleepless night and of this sacred day I have communed with my inmost soul under the teachings of religion and affection, and am now resolved to do my utmost to remedy this horrid state of things.

"I will meet you on your own terms. I will confide in the affection, honor and generosity of my wife—and God grant, for her own sake, that she may justify that confidence. Whatever you mean to do, let me beseech you to do it the instant we are re-united, that the whole matter may be once and forever folded down and the past consigned to oblivion. We will, then, if agreeable to you, immediately leave town for Henderson, after giving directions to Mrs. Peckwell what furniture is to be packed up for the country; and I devotedly hope and pray that this may be the auspicious exodus of a mutual happiness, never to be disturbed again during life.

"In all truth and sincerity,

"Your devoted husband,

HENRY D. CRUGER."

That the said complainant returned from Mrs. Forest's to the house number 55 in Broadway, on or about the eighth day of August in the year last aforesaid. And, on such return, the said complainant produced a formal document, ready for this defendant's signature, which was intended to

settle some part of her property irrevocably on him—and required that this defendant should execute the same. That she positively refused to sign or execute the said document; and, after some discussion, finding that this defendant could not be induced to recede from such refusal, the said complainant stated that he would stand on his rights and that the order which he already had—meaning the said order of July, 1833—was irrevocable; which this defendant supposed to be a true statement. And, thereupon, taking from its place of deposit the said duplicate of such order, which she had so withdrawn from the said Halliday, she handed it to the said Halliday; saying to him, in the presence of the complainant and the said James Monroe, as nearly as this defendant can now remember her words: “There Mr. Halliday, pay the whole income to Mr. Cruger. I will sooner beg my bread from door to door, than touch a dollar of it.”

That, on the same day, after the said Messieurs Monroe and Halliday had left said house, and no other person being present, under the influence of the same feeling, she addressed to the said complainant, as nearly as she can recollect, the following words:—“Mr. Cruger, no person knows how that order was written but you and myself. If you wrote it irrevocable, when you knew I intended it to be revocable, how do you stand? I beg of you to retrace your steps.” That the complainant appeared confounded by this appeal, answered confusedly that he was willing to do any thing to rectify any error into which he might have drawn this defendant and that he would rectify it. And on the same day, he wrote and delivered to the said trustee the following declaration:

NEW YORK, 8th August, 1836.

“To Robert Halliday and James Monroe, Esquires,

“Acting Trustees of Mrs. H. D. Cruger:

“Gentlemen:—Under Mrs. Cruger’s assurance that she did not intend the order for the payment of the income to me to be irrevocable, I, of course, have not the right to have it so considered, which I asserted before receiving that assurance.

Respectfully yours, &c.

“H. D. CRUGER.

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That on the fifteenth day of the same month, just before going up to their country residence, he left for this defendant, at her brother's residence on Long Island, where she was then staying, a paper containing only these words: "I leave our happiness in your hands. August 15, 1836."

That the said complainant, about the last mentioned date, went to their country residence at Henderson, in the county of Herkimer, and early in September next following returned and rejoined this defendant at the said house in Broadway, for the purpose of making arrangements to furnish and prepare for occupation the new dwelling house of this defendant at Henderson aforesaid, then just completed; that, at this time, the said complainant was for some days excessively moody and sullen and evinced his discontent at the condition of this defendant's property in various very offensive ways. That he would refuse to take wine at table, saying that he did not own it; would refuse to ride, saying that he did not own any carriage; and constantly complained of the aforesaid alleged revocation of said order by taking it from the said Halliday. That on or about the 17th of September, in the year last aforesaid, she remonstrated with the said complainant about his conduct—assured him that she did not intend to revoke said order, by taking it from the said Robert Halliday, but only to prevent a waste of the principal of her estate and, by proper economy, to repair the injuries which it had suffered. Whereupon, the said complainant produced the said order and wished this defendant to write thereon the words "restored and confirmed." But she refused to reinstate it; and thereupon the said complainant wrote upon and beneath the same, with his own hand, these words: "Revocable 17th September 1836. HENRY D. CRUGER." That he spent part of the autumn with this defendant at their said country residence; and after their return to their said house in Broadway, in the month of November in that year, he renewed his murmurings about his dependent condition and urged this defendant to unite in three certain papers which he then produced, in his own hand writing: being an authority from her to her trustees to allow her husband to receive the income for life; a power from her and the trustees to that effect; and a

bond from him to pay over to the extent of one half of the income to her. That in order to avoid his importunities, she left her house in November, in the year last aforesaid, and went to reside with her friend, Mrs. John Whetten, with whom she remained until about the fourth day of December following. She denied that she and the said complainant referred all matters or any matters in difference to Messieurs Bard and Whetten. But she did, during her residence with Mrs. Whetten, request the said John Whetten, as her friend, to consult with said Mr. Bard, the friend of the said complainant, for that purpose appointed on his part, as to the best method of pacifying the said complainant and terminating his interruptions of her domestic peace. That no award or decision was made nor did they unite or concur in any opinion, but, on the contrary, each of them put in writing his own opinion. That the letter from Mr. Bard to Mr. Whetton in the said bill set forth and bearing date November 27th 1836, contained the opinion of Mr. Bard only; and that she, on being shown the same, did forthwith absolutely refuse to comply with or act upon the advice contained in such letter. That the said complainant did not acquiesce therein; and, on the contrary, did, on the twenty-ninth day of November in the year last aforesaid, object to the said opinion of Mr. Bard in writing. That the opinion of Mr. Whetten was exhibited to the complainant; and he positively refused to accede to the same and again proposed that this defendant should unite in the said three papers. That she sent to her sister, Mrs. Elizabeth Mary Monroe, the paper under date of the thirteenth day of November one thousand eight hundred and thirty-six as in the bill stated; and she denied that the said complainant accepted or acquiesced in any such paper. But in order to pacify said complainant and restore harmony, so that she could return to her home, she did address to her said sister a letter; and that the following is a copy of the same and of the certificates of the said John Whetten and of this defendant's said sister thereto annexed:

"Snug Harbor, November 30, 1836.

DEAR SISTER :—The first restless night I have had since

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"I have been here was the last, which proceeded from the painful feelings your note awakened—not received till Mrs. Barber returned in the last boat. You said nothing cross—but I sunk under the conviction that I should go out of this world without even my own and only understanding me.

Show the Purity and Portia to Mr. C.; he will and should understand them, as he both put the whole play in my hand when I was going to the farm for you, with a request that I would read it—but, on the resolutions steadied by their illustrious examples, I mean to act.

They were not altogether irrelevant for you, my sister and collateral heir, as you will see when I give you a "clear view," not only of my wishes and feelings, but my resolutions—under the determination I have to make the world understand me that I do not act for money either to spend myself or save for you.

Know then that, though the offer has been twice rejected by Mr. Cruger, I now assign to him—willy nilly—all the evidences I hold, not only of the advances made to Messrs. N. and L. Cruger, but those to himself, his sister, his brother-in-law, his uncle and his uncle in-law. Which, on reference to Mr. Halliday, I believe you will find is getting over \$40,000.

The most of this, my dear sister, is out of the principal of my estate: but you, (the only one of my three heirs who know my circumstances,) have urged me to do it. Of myself, I never would have signed away or even compromised the collateral birthright—you, George and William have—and when the post-nuptial settlement was made, I thought I had secured them.

I also mean to relinquish my plan of reserving a percentage of my income to gradually restore the sums taken from my principal; which would (had I lived long enough) again have given you the unimpaired whole I had received by my birthright.

Thus Mr. Cruger remains in the full possession of my whole income, lessened only by the non-payment of interest by some of those of his family to whom he has made loans.

I never will sign any other papers than those that are signed, my will and my revocable order. But I have said

to Mr. Whetten and will say to all those who desire the respect: "When you see me revoke that order, (let Mr. C. act as he will,) you may give me up, for I will then be given up of God."

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Now, as to my will, a dark thought came over me that I would destroy it; but it was a thought of vengeance and the great lawgiver has said "Vengeance is mine." So now, I here solemnly say, that (also let Mr. C. act as he may,) it shall never be touched.

The light that a word in the last sentence throws on the state of my feelings leads very naturally to my telling you and him that had Mr. Whetten come over with the paper he drew for me, signed "With all the heart of Henry Cruger," there was still a great deal on the score of feeling to be settled *sine qua non*, between him and I, before he would again lie by Portia's side and she have a quiet soul.

Don't let Mr. C. here make the mistake that you did, that I am going from business because I have got a fine idea in this last sentence.

Mr. C., in signing the settlement, has signed the only paper in my favor I ever will receive from him. That secures your rights, in which are wrapped up my duty to my deceased parents.

And now to this solemn paper I put my name.

HARRIET DOUGLAS CRUGER.

To make a finish. Know that I as much expected by the ceremony of the 29th of June, that Mr. C. would have become my agent, as that he would become my husband—and so did Mr. Halliday.

Now, without enumerating—but speaking to the experience fresh in all your mind's memories and I think all my other trustees have said they would not act if he became my agent—the time is past, I have no obstinacy to have Mr. Brown, but an insurmountable one to have Mr. H. again."

I truly believe my sister, in the declarations made in this letter, and that she will strictly adhere to them throughout her life.

E. M. MONROE.

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I have entire confidence in the above sentiments.

JOHN WHETTEN.

Dec. 21st, 1836.

(This schedule verified by the initials.)

G. D.

W. D.

H. D. C.

That the said complainant did not nor would acquiesce in or receive such last mentioned letter or the accommodations therein proposed or any of them, but refused to receive the same, in consequence whereof the said last mentioned letter was, shortly after its date, returned to this defendant by her said sister as rejected by the said complainant. She denied that the said letter ever was put into the hands of the said complainant as a substitute for a regular deed or as having any validity. She was obliged at length to return to her home as aforesaid, without having effected any reconciliation with her said husband.

That the said complainant, on or about March 26 1837, when setting out on a journey to Virginia to make some inquiries about the condition of certain lands there belonging to this defendant and her brothers, took with him the said letter of the thirteenth of November previous and had ever since retained the possession of it. That in the autumn of the year 1838 she visited England with the complainant; and whilst residing with him in London, was again importuned to settle her income upon him; that being in low health and spirits, alone with him and completely subject to his power and influence and being very much distressed and completely overcome and deprived of her free agency by his importunities, she requested him to take her home—and stated that she would give him whatever settlement he desired. But the said promise was not a free or voluntary act and ought not, under the circumstances, to be regarded as of any force or effect.

That the defendant prosecuted his demands for an irrevocable settlement with such vehemence that her domestic peace was almost entirely destroyed. And that whilst she was in great distress from this conduct, her brother-in-law,

James Monroe, called on her and urgently requested her to make some arrangement which would be satisfactory to the complainant. Whereupon she, being worn out by such incessant importunity and most anxious for peace and repose, answered her said brother-in-law that she would sign whatever paper he might dictate, but that she would not live with the complainant after he should have accepted any instrument settling her income or any of it upon him irrevocably. That shortly thereafter, at the instance and on the dictation of the said James Monroe, she executed and handed the said James Monroe the paper mentioned in said bill and dated October 26th, 1839; and, also, the paper in the said bill set forth and dated November 2d, in the same year. That the said paper of October 26th was tendered to the complainant by the said Monroe and rejected as not sufficiently formal and binding to secure to him an absolutely independent power over the income. That the said James Monroe procured the execution of said paper, dated November 2d, in consequence of such refusal and of the desire of him, said James Monroe, to do whatever might be requisite to satisfy the said complainant. That the said James Monroe was not, in the procuring of the said two last mentioned papers signed by this defendant or either of them, the umpire, the agent or the friend of this defendant. But, that the same papers were extorted from this defendant; and when she gave them, she did suppose they would take effect according to their terms, because she knew no means of avoiding any paper which she might be compelled to give to the said complainant. She denied that she, nine or ten days after the pretended exchange of the said papers, in the said bill mentioned or at any other time, wrote to the said complainant that her referee approved of the arrangement thereby effected—and the more so because the said complainant had acted so handsomely in returning a portion of what had been conveyed to him and that she, this defendant, would abide by it literally or anything to that or the like effect. That this denial is made according to the best of her recollection and belief; that she could not recall to mind any such letter; that she distinctly recollected that at the time referred to her mind was distracted with indigna-

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tion and with the most painful emotions ; and, that if there exists any letter containing words which resemble the matter in that behalf alleged in the said bill, the said letter will prove, on being exhibited, that such words were used and ought to be understood in an ironical sense. That shortly after the said second day of November, in the year last aforesaid, the complainant did return from Henderson aforesaid to the said house in the city of New York ; and she, acting upon her resolution, did withdraw herself from the house and go to reside with one of her brothers. That she persevered in such resolution and the complainant did at length execute, under his hand and seal and forward to this defendant, the said paper, dated November second, together with the deed of cancellation release and extinguishment thereon endorsed and dated February 22d, 1840. And she claimed that the last mentioned deed was a complete, valid and effectual extinguishment of all right in her estate or any part or income thereof under or by virtue of any act or deed prior to that date. That the said complainant, on sending said papers, announced to this defendant and to her friends, by means of a letter to her sister Mrs. Monroe and another to her brother William Douglas, that having thus renounced his claim to the income of this defendant's estate, the existing separation should be continued and be thenceforth regarded as the act of him the said complainant and that, in surrendering the said paper dated November 2d, 1839, he surrendered with it all hope of ever being reunited to this defendant. That according to such announcement, instead of returning to New York from Washington city, where said deed of the twenty-second February purported to have been executed, he went to Charleston, South Carolina, and did not return to New York until June following. She admitted that in the same month, in anticipation of the said complainant's arrival in New York, she did go to her country residence at Henderson and there spent the summer. She admitted that, in the course of her correspondence with General James Hamilton, she did, on March 14th, 1840, write to him as for that purpose stated in the said bill. That the said complainant, on such his return to the city of New York, recommenced his efforts

to obtain a settlement upon himself of this defendant's income or some part thereof. And he did, by indirect means, enlist in his behalf the exertions of his own and this defendant's friends and relatives—and caused several of them to make applications for that purpose to this defendant at Henderson aforesaid; and such applications were all accompanied by offers of a re-union, in case this defendant would give to the said complainant her income or some large part thereof. That whilst her relation with her said husband continued in this unhappy condition and about the twenty-fifth day of August in the year last aforesaid, the said William Bard, Esquire, a connection of the said complainant and at said complainant's request, as she was informed and believed, addressed to her a letter in the following words:

“25th Aug. 1840.

*“My Dear Madam:—*I have been your warm friend; and without concealing from you faults which I thought belonged to you, I have felt and acknowledged the influence of virtues which have led me sincerely to vindicate you where I thought you ought to be vindicated in the unhappy circumstances which have existed between you and your husband. You will, therefore, I know, do me and my motives justice, when I say to you that I fear your present position is unfavorable to your peace—and must, at least in one point, be altered, to enable you to justify yourself or your friends to justify you. You conveyed to your husband, irrevocably, the whole of your income—with the declaration that whoever conveyed the deed to him would separate you for ever. It was conveyed to him—did separate you, I hope not for ever—and was returned by him. When you sent it, I earnestly advised you to convey but one half; and when he returned it, had I been near him, I would have advised him to return but half. Had either been, your difficulties would have been easier settled. As matters now stand, you feel that, unless you persevere, you abandon your grounds; and if he yields, he feels not only that he is humbled, but that, however his own feelings of affection may lead him to do so, in the opinion of the world he is driven to a base humility from the love of your money—

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"not of your person—from the love of ease and not from more worthy and better motives. My earnest wish is to see your relative positions altered, as the most likely and easiest means of future reconciliation. But whether reunited or not, your husband's situation at present, is one, I must say it plainly, as I have been accustomed to do, will do you discredit with the public and cannot be approved by those who most esteem you and most desire to see you happy. In such perilous controversies as controversies between man and wife, the party that wishes a quiet conscience must be very sure he is in the right and must take care that all has been done that can be done for peace. From the bottom of my heart I wish your happiness. You will excuse, therefore, my anxiety, when I think you in danger; and that I press you, at least to do that which alone can secure hereafter your own or at present the approbation of your sincerest friends. Henry's present situation of absolute want of the means of respectable living, is not one worthy of you or him. And I earnestly press you to alter it, by settling on him immediately and irrevocably, if not one half your income, such proportion as will enable him to live as one ought to live who has been in the intimate relation of husband to you. I know your intention is, as you have frequently assured me, never to use, for your own purposes, the income you conveyed to him; and that you now withhold it to repay the debts which he owes to your mother's or sister's estate. I have before said, I thought you carried this point too far. But if you leave him in his present situation, friendless and dependent, you carry it to a length that cannot be defended by your best and warmest friends—and will lose you the good opinion of the public. Now let me advise and beg you, for your own sake and in the opinion of one, though as partial to you as I am, absolutely your duty to do in this matter, what is plainly right. Make him easy as to his means of living, as is due to him and as your husband ought to be. No matter whether he does or does not come up afterwards to your ideas of what is right, no matter whether you live with him or do not live with him the remainder of his life. Put it out of the power of others to say you kept him on the rack till you forced

"an unwilling confession and that you looked on his distress triumphing in your power and hoping to force him to your terms. I know such feelings do not belong to you and are abhorrent to your nature. I am, therefore, doubly anxious they should not be imputed to you; and that your anxious friends, among whom I am, should be able to disprove them, by appealing to proofs of a more generous and higher feeling. With regard to the debts due to your mother's or sister's estate, the balance of the income, after deducting what will be proper for Henry, will soon pay their debts; and to leave your husband to starve, expatriate himself or to be dependent on the bounty of others, when you can prevent the necessity of either, would neither comport with your dignity, your character as a woman, nor your religion. Excuse, I beg you, my warmth and earnestness. It arises from the truest anxiety for your welfare, from the peril in which I see you are, and from my sincere desire of being able to vindicate you in all points against partial misrepresentations or unfavorable opinions.

"Affectionately and sincerely,

"Yours,

"WM. BARD.

"Aug. 25th, 1840.

"N. Y. L. I. & T. Co."

That this defendant did, on the 29th of August 1840, answer such letter of the said Mr. Bard, in the following words:

"The spirit of this letter must be complied with! I hereby put at your disposal the whole of my present income, to decide absolutely what portion of it is to be assigned irrevocably to Mr. Cruger; and will you, dear sir, after having so decided, request Mr. Strong to reduce it to form and forward it to me for execution, for you cannot hesitate to decide on a portion, when I was willing to give the whole."

That conformably to the said correspondence and his opinion in the premises, the said William Bard procured and sent to this defendant at Henderson aforesaid, the paper in the said bill set forth dated September 7th 1840, which this defendant executed, acknowledged and returned to the said

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Bard. But she insisted that the last mentioned paper was extorted from her by undue means and improper importunities, practiced by and at the instance of the said complainant; and that the same paper was not a free and voluntary act. That the last mentioned paper was given by her and received by the said complainant, on the condition that by reason of the exaction thereof he and this defendant were to remain so living separate and apart.

That after this occurrence and on or about October 4th, in the year last aforesaid, to her great surprise, on returning to her house at Henderson aforesaid from church late on a Sunday evening, she found the said complainant in said house; that on addressing the said complainant, she referred to the condition on which the said annuity was granted. But after considerable discussion, not seeing how she could do otherwise, she acquiesced in his remaining; and by reason of the said complainant's promises and professions of kindness, soon became so far reconciled to his said breach of faith in exacting such annuity that she ceased to insist on a separation. That the said complainant and this defendant returned in November following to the city of New York and there resided until about June 1st 1841, in external harmony. But during the most of that time, the complainant was continually importuning and harassing this defendant, by speech and action, in relation to the alleged inadequacy of his said annuity and striving to obtain an irrevocable settlement upon him of the whole income. That as early as January 7th 1841, the complainant suggested doubts about the sufficiency of the said will of this defendant; and, thereupon, with this defendant's consent, he drew up a case containing a copy of said will and certain questions as to the validity thereof, which was laid before George W. Strong, Esquire, for his opinion. And that Mr. Strong gave such opinion as stated in such bill; and that she, this defendant, wrote such remarks upon the same opinion as are for that purpose stated in said bill. That when Mr. Strong gave said opinion, she asked him what should be done to obviate the difficulty suggested. Upon which said Mr. Strong advised this defendant to consult with said complainant. This defendant requested said Mr. Strong himself to

do so ; and she was informed and believed that, on being applied to by said Mr. Strong, the said complainant produced and recommended as proper documents the said three papers before mentioned. That she declined uniting in the said three papers ; and then, and not before, wrote the said remarks on such opinion. That from that time until about the first day of June next following, the said complainant importuned and harassed this defendant in relation to her said separate estate almost incessantly. And that her domestic peace being wholly destroyed by such conduct, she, at length, concluded that it was impossible to live with him. That she returned to her said original defensive resolution of 1839 and, accordingly, on or about the said first day of June, left her said house in Broadway ; and she had not, since that time, lived with the said complainant.

That in order to make herself fairly understood, she, on or about the tenth day of the said month of June, addressed to the said George W. Strong, Esquire, a letter, to be communicated to the said complainant, in which she fully explained her aforesaid views ; and stated her said resolution not to live with him so long as he continued to claim a title to any part of said income—but that to relieve herself from his importunities, she would yield to his demands. And she, this defendant, in such letter, gave the said complainant his option, to live apart from this defendant and receive the said annuity of \$3,000 mentioned in said paper, dated the 7th day of September then next previous. or the whole income of her estate, except about \$3,000 a year and the said house in Broadway or to relinquish all claim whatever to any part of said income and to enjoy with this defendant the whole of such income ; the agent to honor his, said complainant's, drafts or those of this defendant—each to keep an account of disbursements upon a plan to be mutually agreed upon—and each regularly and cheerfully to submit his or her accounts and disbursements to the other for approval ; and requested that the said complainant should make up his mind definitively thereon by the 1st day of November then next. That on so leaving said house in Broadway, she went to reside with one of her brothers and also spent part of the summer at Henderson ; but that, until the said first

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day of November, she occasionally visited the said house in Broadway, in which the said James Monroe and his family and the said complainant then resided; the object of such visits being to conceal from the public the fact that she, this defendant, was so separated from her said husband, until she should ascertain with certainty whether he could be induced to abandon his attempts to acquire an interest in said income and return to an observance of the terms of their said ante-nuptial agreement. That she holds a paper in the proper hand-writing of the said complainant. Which said paper is in the following words:

*"Substance of a conversation with Mr. Strong at my office,
17th June, 1841."*

"At the instance of Mrs. Cruger, he made verbally two propositions. First—That her deed of appointment of September last would be cancelled and that the agent should hold the whole income subject to our drafts indifferently. I enquired what security I was to have that this arrangement would not be rescinded. He answered, none but her good faith.

"I replied, that this was going back to precisely the loose state of things and of pecuniary dependence and subjection on my part, out of which all our difficulties had arisen; and that, having been twice warned of its evils by her revoking the order to her trustees to pay me the income, for both our sakes, I would not consent to the arrangement.

"Second—That she would secure to me the entire income, reserving to herself the use of the house in Broadway and the income to which she is entitled from her mother's estate, but she would then separate herself from me.

"To this, my response was that I would listen to no proposition whatever involving a separation. That Mrs. Cruger had no right to separate herself from me. That this would be no cause nor had I ever given her any for doing so.

HENRY D. CRUGER."

That the said complainant wrote to this defendant, bitterly complaining of this defendant's conduct in declining to settle upon him unconditionally the income of her estate; that he refused to visit this defendant either at Henderson

or at her brother's, about twelve miles from the city of New York, on account of its incompatibility with his alleged professional occupations in the said city—and repeatedly declared in the most positive terms that he and this defendant never could enjoy peace or happiness together until this defendant should cause to be definitively and formally settled upon him the income of her estate or, at least, one half of it.

That she returned to the city from her said country residence on the 18th of October, 1841; that she went immediately to the house of her cousin Mrs. Eliza C. Kane and there met the complainant and had a very painful interview with him. That the said James Monroe alone or conjointly with the complainant instructed his wife, Mrs. Elizabeth Mary Monroe, the only surviving sister of this defendant, to procure from this defendant an appointment of one half of the said income to the use of the said complainant. That all the acts and proceedings of the said Elizabeth Mary Monroe were guided by the complainant either directly or indirectly through the agency of the said James Monroe; and that the said complainant at the time, by some indirect means, procured for the attainment of his said designs on the income of this defendant's estate the aid and assistance of the said Mrs. Eliza C. Kane and of Francis B. Ogden. That immediately after this defendant's said return to the city, the said Mrs. Monroe, aided and seconded by the said Mrs. Kane and Mr. Ogden, addressed this defendant and requested her to settle upon the said complainant the one half of the income. This defendant replied to such request, that by virtue of her said offer of June previous, which still lay unrescinded, he, the complainant, had the liberty of taking nearly the whole of said income; and it was, therefore, unnecessary to apply to this defendant for a smaller sum. That her said sister, aided and seconded as aforesaid, treated such answer with ridicule and derision—stated that this defendant had no right to give the whole—but was bound, in order to save herself from general censure, to give to said complainant one half of such income. That her said sister, so aided and seconded by the said Mrs. Kane and Mr. Ogden, pursued such application to this defendant for a settlement of one half of said income upon the said complainant

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unceasingly and in so harassing and importunate a manner as to leave this defendant no peace or quiet. That she resisted the said application and importunities of her said sister to the utmost of her ability : but at length her powers of resistance failed her ; and she yielded—and directed her said counsel to draw the required settlement. That the said George W. Strong accordingly drew up an instrument, bearing date 26th October 1841 and to the same purport as the paper last set forth in the said bill, except that the settlement therein named was for the life of this defendant. And she signed and sealed the same.

That the said paper was tendered to the complainant and that he refused to receive the same. That at this stage of the controversy she was again addressed by her said sister, aided by her cousin and Mr. Ogden, with complaints against the frame of the paper—in this, that it was for the life of this defendant only instead of being for the life of the complainant. They also charged this defendant with having, after her aforesaid submission to their requests, given private instructions to her said counsel to draw the same paper in such unsatisfactory form and renewed their said importunities, censured her for unreasonable obstinacy, threatened her with public odium and continued such importunities until on or about the 8th day of November in the year last aforesaid, when they literally compelled this defendant to secure her tranquility by agreeing to make the said settlement upon the said complainant of half the income of her estate during the life of him, the said complainant, which was going beyond even her said offer through the said Mr. Strong. That having so yielded, she accordingly sent for the said George W. Strong. But, before he called on her, she was obliged suddenly to leave the city for the purpose of visiting a sick friend. She stated to her said sister that she might give such instructions as she thought proper to the said Mr. Strong for the preparation of said settlement. That agreeably to the instructions of her said sister the said Mr. Strong prepared the said paper dated November 19th 1841—and on the ninth day of that month submitted the draft thereof to the said complainant for his approval. That the said complainant, on receiving such draft, instead of acquiescing

therein did, on or about the 10th day of November in the year last aforesaid, submit to the said Mr. Strong a counter-project for a settlement, of which a copy was contained in a schedule annexed to her answer. That the said complainant was given to understand that the paper so proposed by him would not be executed. That after considerable hesitation and on or about the 17th day of November in the year last aforesaid, he signified to the said Mr. Strong that he would accept as satisfactory the said paper dated the 19th November. Whereupon the same was signed and acknowledged by this defendant and sent to said Mr. Strong, who delivered it to the said complainant. And this defendant denied that the said last mentioned paper emanated from her own free will or was obtained without the privity of the said complainant; and she also denied that it was executed whilst she was beyond the said complainant's influence or when he had not seen her for a long time. That during the period of twenty days which intervened between her said arrival in the city of New York and the submission of the draft of such paper to the said complainant, she had had one extremely painful interview with the complainant as aforesaid and was obliged, by the importunities aforesaid, to execute one instrument in favor of said complainant which was rejected by him—and was also obliged to give a reluctant assent to another, purporting to give him further rights. That the said Mrs. Monroe, Mrs. Kane and Mr. Ogden, during the said twenty days and until said paper bearing date November 19th 1841 was executed, were in constant correspondence with said complainant in relation to the obtaining from this defendant such last named paper or some similar document and that all their said urgency, applications and importunities were at the instance and request and with the knowledge and privity of the said complainant.

That although the said complainant so received the said last mentioned paper with the understanding on his part and on the part of this defendant that they were to live apart, yet he remained in the said house of this defendant in Broadway, thereby excluding her from the enjoyment thereof until May 1842, when the said complainant removed therefrom and this defendant has ever since occupied it.

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That she has in her possession various letters written by her to him which he lent to her under a promise that the same should be returned to him ; but not any other papers or documents as far as she could remember ; and she said that, on being allowed a reasonable time to take copies thereof, she was willing to return the same letters to the said complainant, provided he would deliver to her or her trustees the papers and documents belonging to her estate in his, said complainant's, possession. That the two wills and the papers respectively dated October 26th and November 2d 1839, January 29th 1841 and November 27th 1836 were in her possession, but the said complainant did not lend the same or any of them to her. And although some of them were occasionally in the possession of the said complainant who always had free access to this defendant's papers while living with her—yet she had a right to retain the same.

That said papers respectively, dated September 7th, 1840 and November 19th, 1841, were and each of them was obtained from her in opposition to her will and by the persevering and vexatious importunities of the said complainant and his agents ; that neither of them was a free or voluntary act ; and that the same were and each of them was obtained fraudulently against good faith and contrary to the true intent and meaning of the said ante-nuptial agreement and of the said deed of June 29th, 1833. And that her said separate estate ought to be exonerated and discharged from all claims or demands of the said complainant or any other person on account thereof. She admitted that no physical force was employed to compel her to execute the said paper of November 19th, 1841 ; and that she was, at the time of the execution thereof, exercising such independent and separate power of locomotion, without reference to the will or pleasure of the said complainant. That he persevered in threatening this defendant that she could have no peace, comfort or happiness or save herself from the odium of all who should believe his, said complainant's, representations until she should execute to him, said complainant, such settlement of her estate as he should be content to accept. She denied that there ever was any agreement or any promise that the said complainant should have

the income of this defendant's property during his life, leaving the principal to her heirs. That the said complainant did, at the request of this defendant, acting for herself and others, members of her family, devote some but not any very great amount of time, to settling and adjusting their several estates and, that he caused the business to be brought to a close. And that for such services the said complainant was allowed and paid the sum of \$10,000. That she never did persuade or wish the said complainant to withdraw from or discontinue his professional business. That, although true it is that, by mutual assent of herself and her said husband, a new country house was erected in the years 1835 and '36 upon land belonging to this defendant at Henderson aforesaid, yet, that she did not believe that the said house was erected against his own judgment or wishes or merely to gratify this defendant. But this defendant denied that the said complainant's management of the property in the county of Herkimer rendered the same more productive or profitable to her estate. That the large loans to relatives of the said complainant mentioned in the bill out of the cash capital of this defendant's estate, together with the said complainant's own drafts from such capital, amounting in the whole, with interest, to about \$70,000, had greatly diminished the income of her said estate. And this defendant admitted that, either before or after the making thereof respectively, she had expressed her acquiescence in such loans; and, although some of them were made without her previous assent, yet, for peace sake, she afterwards acquiesced. And she also admitted the assent of said Robert Halliday; but this defendant could not admit that the responsibility alleged in said bill to have been incurred by the said complainant, by giving or joining in bonds for such loans, afforded any security to this defendant for the re-payment thereof or was any fulfilment, in part or in whole, of any agreement between the said complainant and this defendant. And this defendant admitted that, when suffering under the importunities of the said complainant, but at no other time or times, she repeatedly offered to give to the said complainant the said bonds and mortgages and securities for the loans to his said relatives

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in the said bill mentioned ; but she denied that he, the said complainant, ever accepted any such offer. That she never freely gave the said bonds, mortgages and securities to the said complainant—and that, if the said complainant ever had any title or pretence of title to the same, he wholly relinquished and surrendered the same for the benefit of this defendant's separate estate by the said instrument dated the twenty-second day of February one thousand eight hundred and forty in the said bill set forth. That on or about March 19th, 1841, Frederick De Peyster was employed as agent. That said newly employed agent was instructed by this defendant's trustees to collect all arrearages of interest upon the bonds and mortgages belonging to her estate. And, in case it should become necessary, to foreclose the mortgages and collect both principal and interest. That the said complainant treated with her said agent and trustees for permission to retain the said bonds, mortgages and securities, for the purpose of collecting the same—and had never, in fact, given up or transferred them or any of them to this defendant, her said trustees or agent ; but, on the contrary, at last, when urged to deliver up the same to said agent, wholly refused so to do.

And the defendants, George Douglas and William Douglas, answering, said they had a personal knowledge of very few of the foregoing matters ; but, they were informed and believed that the several matters set forth by the said defendant, Harriet D. Cruger, were true and they, therefore, insisted on the same. They admitted that after receiving the said paper, dated November 19th, 1841, in the said bill mentioned, the said complainant applied to the agent of the said estate for a balance sheet of the estate ; and that an accountant was employed to prepare the same at the expense of the said estate ; and that the complainant had frequently applied for the same account and that these defendants refused to furnish the same ; and also, that the said defendants, George Douglas and William Douglas, with the knowledge and consent of this defendant, Harriet D. Cruger, had, through the said agent, from time to time, for about twelve months, made payments to the said complainant, in pursuance of the terms of the said last mentioned

paper and had so far acted upon the same. And that they, these defendants, were under the belief and impression, until about November 14th, 1842, that the said complainant (having, as aforesaid, extorted the said last mentioned paper from the defendant, Harriet D. Cruger) could enforce the same according to its terms and that these defendants had no remedy against the fraud and injustice attempted to be perpetrated by means thereof. But these defendants on or about the last mentioned date were advised that the same was void at law and in equity. That by reason of such advice they had ever since refused to recognize the same or to make any payments thereunder. And that the same balance sheet not having been completed until after they had received such advice, they, of course, refused to exhibit the same to the complainant when it was completed. And these defendants denied that they were regardless of their duties as trustees. That they had executed the same with ordinary care and ability and to the entire satisfaction of the defendant Harriet D. Cruger; and that they were perfectly solvent and able to make good any loss of said estate for which they might be made chargeable. And these defendants denied that they were ignorant of or incompetent to perform the duties of trustees. And this defendant Harriet D. Cruger, further answering, admitted that ever since her said marriage she had been and was willing and desirous to live with the said complainant as his wife and to suffer and permit him to enjoy all the benefit of her whole income; but that so long as the said complainant, in violation of the said ante-nuptial agreement and of the said post-nuptial settlement deed, insisted on having a right in or title to the income of her said estate real or personal or any part thereof she could not consent to live with him; that she could not so far control her feelings as to associate in her own house on terms of affectionate intercourse with one whose daily acts of dominion over her property would continually bring to her mind the injustice by which that dominion was acquired. These defendants admitted that at the time of the said marriage the personal estate of the defendant, Harriet D. Cruger, amounted to about \$135,000 in value and her real estate to about \$130,000 in value. That the income of

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her whole estate real and personal did not exceed \$10,000. The defendants insisted that the post-nuptial settlement deed was not void, but was valid at law and in equity. And that if the same or any part or provision thereof was void as being repugnant to the revised statutes of the State of New York or otherwise, then, the said complainant was bound by the principles of equity and ought to be decreed to execute or unite in proper instruments and conformably to the ante-nuptial agreement between him and this defendant Harriet D. Cruger, subject to the trusts and powers in that behalf above mentioned or so settle all the estate and interest in such property which he, the said complainant, could or did acquire at law by or by means of the said marriage. And this defendant Harriet D. Cruger, further answering, said that the said post-nuptial settlement deed was executed by the said complainant in consideration of the said ante-nuptial agreement and of the said marriage duly solemnized upon the faith thereof and was delivered to and accepted by this defendant and her said trustees as and for a compliance therewith and upon the representation of the said complainant that the same was a valid and binding instrument and effectual for the purposes so as aforesaid contemplated by the said ante-nuptial agreement.

A cross bill was filed by the wife, wherein she showed that the said Henry D. Cruger, in consideration that she would marry him, did undertake and faithfully promise her that he, as soon as conveniently practicable after the then intended marriage, should and would cause all the property, real and personal which she might have at such marriage and all income thereof to be settled on her and vested in trustees in such proper and usual manner as the laws required and permitted and as counsel should advise for the purpose of securing the whole principal and income to her sole and separate use during coverture, free from any control or interference of the said Henry D. Cruger and excluding him from acquiring through or by means of such marriage any right whatever in such property or the income thereof and that she should be vested, notwithstanding such expected coverture, with the fullest powers of disposition and control over the said estates and income that the laws

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would permit in a marriage settlement for the purposes aforesaid. That, at the instance of the said Henry D. Cruger, she thereupon consented so to marry him and that relying upon the promise and undertaking aforesaid and in pursuance of the ante-nuptial agreement so formed between her and him as aforesaid and in performance of such agreement on her part, she married. That the execution of formal instruments, so settling her said property as aforesaid, was deferred, at the special instance and request of the said Henry D. Cruger, until the said marriage should have been solemnized, in order to prevent the implication which he, the said Henry D. Cruger, alleged would arise from any earlier execution thereof that full confidence had not been reposed in his honor and integrity—an implication which he alleged was offensive to self-respect and tended to degrade him in the estimation of others. That immediately upon the solemnization of said marriage, the said Henry D. Cruger, in her presence, delivered into the hands of one of the trustees therein named, who was then present, as the act and deed of him, the said Henry D. Cruger, the said deed of marriage settlement dated the twenty-ninth day of June one thousand eight hundred and thirty-three; and he insisted that the same was good and valid, but, still, was so inartificially and unskillfully expressed as to render its validity, in some respects, liable to be questioned—and ought to be made good in equity. That the order of the fifteenth day of July one thousand eight hundred and thirty-three was given merely for the purpose of facilitating the disbursement of her income as, from time to time, she might desire and was merely temporary and revocable in its nature. And that transfers or papers of the seventeenth day of September one thousand eight hundred and forty and the nineteenth day of November one thousand eight hundred and forty-one were obtained by the unkindness of the husband, Henry D. Cruger, and by excessive and irresistible persuasion and importunity and threats and coercion practiced upon her, the said Harriet Cruger, by him and others acting (as she believed) on his request and by his procurement; and that these two papers were not voluntary acts, but were obtained by undue means and were void. *Prayer*: That

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the said Henry D. Cruger might be decreed specifically to execute the said ante-nuptial settlement or duly to execute such deed of marriage settlement as was designed and intended by him when he made the said deed of the twenty-ninth of June 1833. And that proper instruments for these purposes or one of them might be settled by or under the direction of the court and duly executed by the proper parties and that whatever was or might be defective in the said deed of marriage settlement of the twentieth-ninth day of June 1833 might be reformed and corrected and supplied by the court so as to bind the said estates real and personal and quiet the complainant and her trustees in the possession of their respective rights therein. And that the said Henry D. Cruger might deliver up all the said papers or transfers of the seventeenth day of September one thousand eight hundred and forty and nineteenth day of November one thousand eight hundred and forty-one, to be cancelled; that he might be restrained by perpetual injunction from making any further claims under either of the said two last mentioned papers; and that he might be compelled to perform and execute all such acts and deeds as the court should direct; and, further relief.

By the answer to this cross-bill the defendant therein, Henry D. Cruger, denied that the papers or transfers of 1840 and 1841 were obtained by unkindness, threats or coercion or by improper persuasion or importunity or by any undue means; that the same were binding on the said Harriet Cruger and her trustees; and that she was estopped, by her acknowledgments thereto, from denying their validity as free acts. Much of the matter embraced by the original bill was turned into the answer to the cross-bill; and the defendant therein set up the statute entitled of "Fraudulent conveyances and contracts relative to goods, chattels and things in action" against the alleged ante-nuptial parol agreement.

Both causes came up together on pleadings and proofs. A mass of testimony, with many exhibits, embracing private letters, was used. But it is believed that the pleadings set forth and the facts and circumstances embraced by the

opinion of the court will be found quite sufficient for an understanding of all useful points involved in this case.

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Mr. Thomas L. Wells, Mr. Anthon and Mr. George Wood, for Mr. Cruger.

Mr. Charles O'Connor, Mr. Bidwell and Mr. B. F. Butler, for Mrs. Cruger and George and William Douglas.

THE VICE-CHANCELLOR :—The bill in the original cause is filed by Mr. Cruger against his wife and her two brothers, who claimed to be trustees of her estate, for the purpose, in one aspect, of ridding the estate of the trust, in order that there may be no obstacle in the way of his asserting the common law rights of a husband to the property of his wife ; or, in case it shall turn out that there is a valid subsisting trust under which the property is held, then, that he may have the benefit of a deed of appointment executed by her under date of the 19th November, 1841, purporting to give him one-half of the net income of the whole estate real and personal during his natural life : and the bill calls upon the two brothers of his wife, either to yield the possession of the property to him to be managed as a husband is entitled by law to manage, possess and enjoy the property of his wife or else, in their capacity of trustees, to perform their duty in respect to the making of investments, the collection of rents and income, the paying of dividends and the rendering of proper accounts or that they may be removed from the trust and other trustees appointed in their stead.

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On the other side, the cross-bill, filed by Mrs. Cruger against her husband, has for its object—first, the establishment by decree of this court of a deed of settlement executed by him immediately after the solemnization of their marriage on the 29th of June 1833, by which she claims that the whole estate both real and personal became and was vested in trustees for her use and subject to her appointment and disposal as if she were unmarried and to be held and kept during the marriage entirely exempt from his control ; and secondly, it seeks to annul and have de-

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clared void all appointments and settlements of the income which she at any time may have made upon or in favor of her husband and especially the last act or deed of the kind executed by her under date of the 19th November, 1841, before mentioned.

This presents a very general view of the nature and object of the suit on both sides; and it will readily be perceived that this court can deal with the controversy only so far as property is concerned. Over the conduct and acts of the parties, except with reference to their respective rights of property and for the purpose of enforcing those rights when ascertained, this court can exercise no control. It has not jurisdiction to compel cohabitation where one party withdraws from the society of the other without justifiable cause nor to decree a restitution of conjugal rights withheld. Whether the decision I am about to make will have a tendency to produce such desirable results from any moral force or influence it may carry with it, I cannot undertake to predict; but I will indulge the hope, that the questions, which have so long agitated the minds of the parties, in relation to the property, being once settled by a definitive sentence or decree upon just and equitable principles, there will be nothing left to disturb the peace and harmony that always should subsist between intelligent, upright and virtuous minds and that they will see the importance of returning to those duties which the domestic relation requires and which, as enlightened members of a moral and Christian community, is demanded of them.

The first question to be considered is, on the validity and effect of the husband's deed of the 29th day of June 1833, as constituting a post-nuptial settlement of the property upon the wife? The whole of the property belonged to her before the marriage and the absence of anything in the shape of a marriage settlement would leave him to enjoy the legal rights of a husband over her property which could not be disputed.

Much, therefore, depends upon this instrument; for, if it cannot be sustained of itself or as evidence of an ante-nuptial agreement which the court is bound to carry into effect, then, all the court has to do is to pronounce it a nullity and

leave the husband in the possession of the rights conferred upon him by the marriage.

In the first place, the instrument is alleged to be void upon its face, for the reason that there is no consideration expressed.

The statute relative to fraudulent conveyances and contracts, 2 R. S. 134, 135, does indeed require that certain contracts or agreements, in order to be binding, must be in writing and must express the consideration and must be subscribed by the party or his agent. But, this provision of the statute has reference to executory contracts or agreements, such as rest in covenant or promise to do or perform some act in future and does not apply to contracts executed by the act or deed itself. This is manifest from another section of the same statute: "No estate or interest in lands, (other than leases for a year) nor any trust or power over or concerning lands or in any manner relating thereto shall be created, granted, assigned, surrendered or declared, unless by act or operation of law or by a deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, &c."

Here, no mention is made of a consideration expressed. In an instrument, therefore, which of itself creates and passes the estate, title or interest by words of grant, assignment, surrender or declaration of trust, it is not necessary that it should express the consideration on which it is founded. A consideration is implied from the fact of the party's signing and sealing the instrument, and this is sufficient to support it as a deed until it is impeached or invalidated for some other cause. Now, the deed in question is not in terms executory or promissory. It is not a covenant or agreement to do something in future, but it is an act or deed by which all that was ever contemplated is done and accomplished at once. It speaks in the present, not in the future tense. It purports to divest the husband of all interest and right in his wife's property which he had acquired at law by the marriage and to vest it in trustees for her separate use. The language of the deed is, that he thereby freely, fully and unreservedly releases and conveys all the estate both, real and personal, of the wife which she

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then owned or might afterwards acquire and all his right, title and interest therein, &c. It is, therefore, an executed, not an executory instrument and does not belong to that class of written instruments which are declared void by the statute of frauds for not expressing the consideration.

The next objection taken to this instrument is that, if not void for want of an express consideration, still, that it is void by the statute of uses and trusts, as containing a trust not sanctioned by that statute: 1 R. S. 727, § 55. The trust as declared is that the trustees are "to hold and keep both the principal and interest thereof (that is of the whole estate) during the said marriage exempt from his (the husband's) debts, contracts or control; to be managed and disposed of on her separate orders or receipts or by her deeds or will, so that she may enjoy and dispose of the same as it came from her parents and sister or may hereafter in any manner accrue to her in all respects as if she were unmarried." In the matter of time or duration the trust is not objectionable, for it is to continue only during the marriage of the parties and by no possibility can this extend beyond the life of the wife. The objection, however, rests upon a more formidable ground, viz.: that by the terms of the deed the trustees are not required to perform any active duties in the management of the estate or in the receipt of the rents and profits and the application of them to the use of the wife, but the wife herself, instead of being a mere recipient or passive party, is constituted the active party in the trust to manage the property in all respects as the legal owner. That such a mere nominal trust is contrary to the policy of the law and the spirit and intention of the statute is not now to be questioned. The final decision in the case of the Lorillard Will and in other cases subsequently has settled that point. The question is, whether the trust here created or intended so to be is of that character? It must be admitted that the deed is informal and the trust inartificially expressed; but it does not follow that it will be disregarded on that account as entirely ineffectual. This court looks at the substance rather than at the form of things and endeavors to ascertain the object and design of every deed or instrument brought before it. If the words used admit of dif-

ferent meanings, by one of which the instrument may be good and by another void, the duty of the court is to attach to them the meaning that will uphold rather than the one that will overthrow the deed. The words of strongest import against the validity of the trust in question are these: "To be managed or disposed of on her separate orders or receipts or by her deeds or will, so that she may enjoy the same in all respects as if she were unmarried"—carrying with them the appearance of an intention to place the whole property in her possession and to leave it to her management as well as to her ultimate disposal as though she were a *feme sole* and as though trustees were but nominal parties in the deed and had no duties to perform; but when these words are read in connection, as they must be, with those that precede them a different sense is conveyed. The words that precede are words of a lease and conveyance to third persons by name. They are sufficient to pass whatever legal interests or rights of property the husband had acquired in the estate of his wife by the marriage; and the trustees became vested with those rights by the delivery and acceptance of the deed: *Cunningham v. Freeborn*, 11 Wend. 247, 248. From that moment their duty as trustees commenced. It was an active trust they were called upon to execute—a trust in the first place "to hold and keep both principal and interest of the whole estate during the marriage exempt from the husband's debts, contracts or control." How could they hold and keep and protect the property and especially the income from the husband and against his creditors, without taking it into their own hands and under their control? To have it in the possession of the wife and under her management would be to leave it still in the husband's possession and under his control. Her possession would, in legal contemplation, be his possession and the declared object of the deed might, therefore, be defeated. It must not be supposed that the parties intended such a result. On the contrary, it was as necessary to vest the trustees with the actual possession as with the legal title; and both being united in them the active management of the estate at once devolved on the trustees, one of whom (Mr. Halliday) immediately entered upon the du-

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ties of the trust and did, in fact, take charge of and manage the estate.

So far, therefore, as respects the commencement of the trust clause in the deed, viz. : "to hold and keep the property," &c. for the purpose of protecting it against the acts of the husband himself, it appears to be free from the objection that no active duties on the part of the trustees were required.

Do the words then which immediately follow, "to be managed and disposed of on her separate orders or receipts," &c. take from it that character? In my opinion they do not. It is very evident they were not intended to relieve the trustees of their duties and to convert them into mere automata or nominal parties to the trust. No such meaning ought to be given to the words and the whole taken together ought not to bear that construction. A more consistent and rational understanding of them is that they were meant to designate the wife as the sole beneficiary of the trust—to point out very generally the manner by which she might receive and enjoy the benefit of the property free from his control, viz. : by orders on the trustees and receipts to them in her own name and by ultimately disposing of the estate as she might see fit. The latter is in the nature of a power of appointment to be exercised by deed or will.

Still, the question is not wholly disposed of; for, although one objection is removed, another remains. The trust as declared is not in the words of the statute, "to receive the rents and profits and apply them to the use of the wife." It has been held repeatedly not to be essential to the validity of the trust that it should be expressed in the very words of the statute. A deviation in the phraseology will not vitiate, provided the object of the statute is substantially complied with : *Gott v. Cook*, 7 Paige, 538, 539 ; and here I think there is a substantial compliance with the statute.

It follows, from the nature of the trust, that the trustees must receive the rents and profits. This, as already shown, is a part of the active duty belonging to the trustees to hold and keep both the principal and interest exempt from the husband's debts, contracts or control ; and when the money is paid over upon the wife's separate orders or receipts, it

is applied to her use within the meaning of the statute :
Gott v. Cook, supra.

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I have thus far considered the question on the law of trusts in relation to real estates; the statute of uses and trusts having reference solely to that species of property. But with regard to the personal property embraced by the same deed of settlement, it will be perceived that the trust is equally free from any well founded objection.

We have no statute declaring how or for what purposes personal property shall or may be placed in trust nor imposing any restriction upon trusts of personalty, except trusts of accumulation for the benefit of minors, which are to be limited to their respective minorities and all beyond that period are made void.

There is a statute, also, against suspending the absolute ownership of personal property beyond the period of two lives in being and, by which, moreover, limitations of future and contingent interests in personal property are subjected to the same rules as prescribed by another statute in relation to future estates in lands; but none of these statutory provisions touch the deed in question. There is here no trust for the purpose of accumulation—nothing that operates as an undue suspension of the absolute ownership of property and no violation of the rules of law in regard to future or contingent estates.

If I am correct in holding this to be a valid deed of settlement upon its face and the trust, such as, upon a fair construction, the law has not prohibited, then, it becomes unnecessary to determine whether there was or was not an agreement ante-nuptial on which it was founded. The parties are at issue on that point. The wife claims for the deed that it was executed in pursuance of a previous agreement or understanding which formed a condition on which she entered into the marriage compact; and that, however informal or defective the instrument might prove to be, there being ample consideration in the fact of a previous agreement, this court will reform the deed if necessary and sustain and establish it as a valid settlement upon her.

On the other hand, the husband denies that any previous agreement existed for a settlement as a condition of the

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marriage or otherwise ; and he asserts that the deed as executed and delivered was a voluntary offering on his part.

The proofs in the cause do not furnish direct and positive evidence of a previous agreement by which the property was to be settled upon the wife after the marriage. In all probability it was a point about which they had not specifically agreed, although a wife's right to retain the control and exclusive ownership of her estate after marriage had been often and for a long time a subject of discussion between them. She had been taught to believe in the superiority of the wife's right in that respect over the marital right which the common law confers upon the husband ; and she appears to have adopted it as a fixed principle in relation to her property never to surrender the control and ownership of it to a husband any further than to allow him to enjoy the income with herself and to be a disbursing agent of it for their mutual benefit. To this, as a principle of her life, she has clung ever since the marriage, even at the sacrifice of her domestic peace and happiness. Still, I believe the marriage took place without having that point conceded to her, but, as I have no doubt, under the fullest persuasion in her own mind, that her husband, understanding as he did her sentiments upon the subject, would fulfil that expectation and relinquish the right which the law would give him over her property and, that knowing her wishes and actuated by a desire to gratify them, he prepared the instrument beforehand and upon the solemnization of the marriage promptly and generously executed it, divesting himself of all right of property in her estate which he had but that instant acquired. This view of the circumstances which led to the making of the deed and under which it was executed and placed in the hands of the trustees, tends to the removal of all conflict in the statements of the parties concerning it.

The next question, then, is upon the character of the order of Mrs. Cruger upon Halliday, the acting trustee and agent of the estate, under date of the 15th day of July, 1833, by which he was authorized to pay to Mr. Cruger the income of the estate as it should accrue. Was this a mere authority for him to receive the income as being still the

money of the wife or is to be regarded as an appointment under the deed of settlement irrevocable in its nature and by which the income of the estate was given back to the husband as his own? He claims for it the character of a gift to him of the whole income made in fulfilment of a verbal declaration of hers to that effect on the evening of the marriage, in consideration of having executed the deed of settlement. Her answer called for upon oath and responsive upon this point, denies that such was the origin and object of this order. She says that, feeling gratified by his conduct in executing the deed and having previously intended to allow him to enjoy the income of her property in case he should survive her, she called upon some of the persons present on the occasion of their marriage to witness her declaration, that if she should die before having an opportunity to make a will, it was her will that her husband should enjoy the income of her property during his life; and she positively denies that she made or intended to make, by that act or declaration, any other gift or disposition in favor of her husband than by a verbal or nuncupative will to take effect at her death in case he should survive her.

That the purport and design of her declaration so made was testamentary, is placed beyond all doubt by the concurring testimony of the Rev. Dr. Phillips, the Rev. Dr. Wainwright and Mr. Monroe. They prove that it was expressed as her "will" to take effect in the event of her death suddenly occurring before one in writing could be prepared.

Her husband had just parted with all his interest in her property and she wished to guard against a contingency by which he might be deprived of all benefit from the income of the estate which she intended he should have during his life in the event of his surviving her. Such a disposition of the income would, of course, take effect only at her death; a thing very different from a gift or an intended gift to take effect or become absolute in her life time. She denies, moreover, in her answer, that the proposed nuncupative will had any connection with the subsequent giving of the order of the 15th of July or that the latter was in

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confirmation and fulfilment of the alleged gift of the income made by the former or intended thereby. I am bound to believe her statement in this particular, because it is responsive to a direct allegation of the bill and the denial is not disproved by any evidence in the cause.

The answer likewise explains the circumstances under which the order was made and states her reasons and motives for it; all of which are perfectly in keeping with the idea of its being a mere matter of business arrangement between herself and husband and not a gift of the income to him. She appears to have been made aware of the embarrassment that might arise from her undertaking to make deposits in banks on her separate account and to draw checks in her own name; and deeming it to be (as she very properly might) the more appropriate duty and business of her husband to look after her income and to attend to the disbursing of it in their personal and family expenses and being anxious, at the same time, to save his feelings from all seeming distrust and to show how unbounded was her confidence in him, she subscribed the order in the very significant and feeling manner expressed upon its face.

Some effort has been made to support the husband's claim under the order as a purchase of the income founded on the consideration of his relinquishing a lucrative profession on entering into the marriage; and, on the other hand, numerous facts and circumstances have been adduced in argument to prove that no such idea could have existed at the time nor for a long time afterwards, even in the mind of the husband himself; and that his letters on various occasions and his acts and proceedings during a series of years are opposed to any such construction being given to the transaction.

There is much force in the argument drawn from these sources, but it is unnecessary to dwell upon them here. An attentive consideration of all the circumstances has satisfied me that the order of the 15th day of July, 1833, was not given as an irrevocable appointment of the income to the husband in effect restoring to him his marital right in the property and that such is not the true character and was not the intention of it.

Thus far, then, we find that, by the husband's deed of settlement, the whole property, capital and income, was secured to the wife; and by her order a stewardship was created in the husband over the income, which involved in itself the duty of keeping accounts. This duty, in fact, he undertook to perform; but it appears soon to have become irksome to him.

At the second anniversary of their marriage the discovery was made that the sums drawn from the trustees and expended had exceeded the income. This circumstance and the trouble of keeping minute accounts led to dissatisfaction and produced some difficulty. It was a cardinal rule with her not to allow the capital of her estate to be encroached upon or diminished; and although the husband immediately upon its being discovered made good the deficiency out of his own resources, it showed the necessity of more economy and a closer attention to the keeping of accounts. The latter duty had a tendency rather to increase than to remove the cause of his discontent. This is shown by his handing back to her the order, with liberty to her to revoke it if she pleased. She, however, did not revoke it, but addressed to him a note under date of 29th of June, 1835, by which she proposed to relieve him in some measure from the trouble of keeping minute or detailed accounts and to allow him to retain a specified part of the income for his own sole use and without any accountability to her for it.

The terms thus proposed she offered to confirm by orders or directions to her trustees. All this was done as she says—and she speaks responsively—not for the purpose of creating an irrevocability about her former order, but to lessen his dissatisfaction and to silence his remonstrances about keeping full and particular accounts and to render the manner of receiving and disbursing her income more agreeable to him. I do not see, therefore, that the rights of the parties, as they existed previously, were materially changed by this act of hers of the 29th of June, 1835.

The original order which he offered to surrender appears to have found its way back into his hands and all things went on harmoniously between them until another year

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had elapsed. At this time (towards the last of July, 1836) fresh difficulties arose. For causes either real or imaginary, which she has set out in her answer, she withdrew the agency of the estate from Mr. Halliday, the acting trustee, and took from him the duplicate of the order of the 15th of July, 1833, which had been deposited with him and appointed Mr. Brown agent of the estate in the place of Halliday ; and this change was made without previously notifying her husband of what she was about to do. Of course it was a surprise upon him and he became greatly excited by it, so much so that he left their residence and took lodgings elsewhere. Then, for the first time, the question seems to have come under discussion between them, whether the order she had recalled was revocable or irrevocable ; and it resulted, after a few days separation, in his writing a note addressed to Mr. Halliday and Mr. Monroe as trustees of the estate, dated 8th of August, 1836, in which she says that under Mrs. Cruger's assurance that she did not intend the order for the payment of the income to him to be irrevocable, he, of course, had not the right to have it so considered. This removed at once all cause for his separating from her and he accordingly returned, having determined to meet her, as expressed in a letter to her at the time, upon her own terms, viz : "trust in her confidence, affection, honor and generosity." After this reconciliation the parties spent a part of the autumn of that year (1836) together at Henderson, their country residence, in Herkimer County, from whence they returned to the city some time in November.

The subject of this dependent condition was now again renewed as a matter of discussion between them attended by importunity and a course of conduct towards her (of which she complains) in order to induce her to make some settlement of income upon him by which he might be relieved from the state of dependence and uncertainty in which he was placed. With a view to some arrangement to that effect, the friendly offices of Mr. Bard and Captain Whetten were accepted as arbitrators and their opinions and advice as to the basis of a settlement dividing the income were given, but without effect. Nothing came of it or of certain papers which he caused to be prepared about

the same time and requested her to unite with him in executing, but which she refused to execute. Comparative peace and quietude, nevertheless, appears to have been restored to the minds of the parties at that period by a solemn declaration which she made in writing addressed to her sister Mrs. Monroe, under date of November 30, 1836. This paper embraced the most important points in the controversy between them. Mrs. Monroe gave it her sanction and approval Dec. 20, 1836, in these words: "I truly believe my sister in the declarations made in this letter and that she will strictly adhere to them throughout her life." Captain Whetten, also, expressed in writing his entire confidence in them.

From this time until the autumn of 1839, a period of about three years, the parties appear to have lived happily together, nothing having occurred to disturb the harmony between them. A portion of the years 1838 and 1839 was spent in Europe. On their return home they went to Henderson and passed the summer of 1839 at that place. In autumn, on coming to town, a difficulty again arose about the income in consequence of the dishonor of a draft which he had drawn on Brown, the agent, for money to pay debts or expenses incurred at Henderson, she having given some instructions to the agent which the agent supposed forbade his acceptance of the draft, though the draft was very soon afterwards accepted and paid. This circumstance induced a renewal of the importunities and demands upon her for a settlement which should place something irrevocable at the disposal of her husband. She was urged to this by her brother-in-law Mr. Monroe and she finally yielded so far as to sign an instrument addressed to Mr. Monroe dated 26th October 1839, by which she declared that her husband's power to draw the whole income as it accrued during his life should be deemed irrevocable; and this was followed up by executing a deed of the 2d of November 1839, which purported to settle upon her husband the whole income of the estate, real and personal, during his life, excepting the share which belonged to her of her deceased mother's and sister's estate. Upon this being done, the husband executed a deed of appointment on his part dated the 5th of the same month, referring to her

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deed of the 2d, by which he directed the trustees to pay to her so much of the income as would, with what she had reserved herself, constitute one half of the whole income of the estate.

These instruments however proved entirely unavailing. She had intimated, at the time of executing the deed on her part, that her husband's acceptance of it would be the means of separating her from him. The declaration was made in pursuance of a determination long previously formed and never meant to be departed from, that if constrained to give him an irrevocable power over the income, she would not live with him while he held it. The prediction was verified, for on his coming to town, after exchanging the papers, he found that she had left their home and had gone to her brother's and that she refused to return and live with him so long as he retained the deed and claimed any rights under it.

This state of things continued until the 22d of February 1840 when he, being at Washington, endorsed upon the deed a surrender and cancellation of it and sent it to her. From Washington he proceeded to Charleston, South Carolina, where he remained until the following June. He then came back to New York and found she had gone to Henderson where she remained apart from him all the summer.

Now again the friendly advice of Mr. Bard was offered in a letter addressed to her expressive of much good feeling and concern for the happiness and honor of both and strongly urging her, for both their sakes, to make a settlement of some portion of the income upon her husband that should be permanent and irrevocable. She promptly replied to Mr. Bard's letter, placing at his disposal the whole of her then income so that he might decide what portion of it should be assigned irrevocably to Mr. Cruger and, after he had decided, then authorizing him to have the proper instrument prepared and forwarded to her for execution.

A deed of the 7th of September 1840 was accordingly prepared and sent to her which she executed and returned to Mr. Bard and the same was thereupon delivered to her husband. By this deed she assigned to him out of her income an annuity of three thousand dollars, to be paid to him dur-

ing his natural life. Notwithstanding this deed had all the appearance of being a perfectly free and voluntary act on her part and, as he says, was intended as an adjustment of all difficulties between them and to bring them together again, yet it would seem from her statements that she executed it without any view to cohabitation and that she still meant not to depart from her purpose of living separate provided he accepted the deed and should undertake to claim an irrevocable power over even so much of the income.

If such was her resolution at that time it is certain, however, that she did not long adhere to it. On his proceeding to Henderson soon after receiving the deed, she became reconciled and they were again united, so that in November following they came to town and took up their residence for the winter at her house 55 Broadway, where they continued to reside in external harmony until some time in June 1841.

Then it was that she again separated from him and they have not since resided together. The immediate cause of this their last separation does not very distinctly appear. A variety of circumstances may have contributed to it. Mrs. Monroe, who was present when she left, says it was owing to some misunderstanding about money matters—that neither she nor Mr. Cruger seemed to understand each other's views on money matters—that Mr. Cruger expressed his disapprobation of her going—opposed her going—but nevertheless handed her to her carriage.

But it is not very important at present to ascertain more particularly the cause. I only advert to the fact of their separation in connection with other prominent matters that have occurred since 1835 in relation to the husband's acquiring an interest in or a control over the income of her estate in order to come at that part of the case which I am now about to consider and upon which the right and claim of the husband to any interest or ownership in the property entirely depends. I refer to her deed of appointment of the 19th of November 1841, the last she ever executed and by which, according to its purport, she irrevocably assigns, transfers and appoints to her husband, in pursuance of the power contained in her post-nuptial settlement with him (meaning his deed of the 29th of June 1833) the one equal half part of the net income

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of all her estate, real and personal, for and during the rest of his natural life from and after the first day of November then instant and directs the trustees of her estate to pay to her husband such moiety of the income accordingly, declaring the provision thereby made to be in lieu of the annuity of three thousand dollars. This deed is a matter of vital importance to the husband provided I am correct in my views as to the validity of the original deed of settlement and as to the effect of the order of the 15th of July 1833.

If found to be a valid instrument, both on the law and the facts of the case, then he is entitled to the aid of the court in carrying its provisions into effect. But, should it fail of support, so necessary to its validity, then there is nothing left for the husband to fall back upon within the province or jurisdiction of this court to enforce, unless indeed the court can reinstate the annuity which was surrendered when the deed in question was delivered; the grant of which annuity however is now as strongly impugned as is the deed which succeeded it. The form of this last instrument, as a deed of appointment, is not objected to, but it is insisted, in the first place, that she had not the capacity, legally, to make such a deed or any other instrument purporting to convey or to dispose of the income. The power as expressed in and intended to be conferred by the husband's original deed of settlement is broad enough to authorize her to dispose of the income as well as the principal either by deed or will and it is that sort of power which a married woman, notwithstanding coverture, is expressly authorized by the statute of powers to execute by herself without the presence or concurrence of her husband: 1 R. L. 735, sec. 110; Ib. 737, sec. 130.

But the objection lies deeper. It is based upon the disabling or prohibiting language of the 63d section of the statute of uses and trusts which, it is contended, renders her legally incompetent thus to part with or dispose of her income.

That section does indeed declare that "no person, beneficially interested in a trust for the receipt of the rents and profits of land, can assign or in any manner dispose of such interest;" though, where a trust for the payment of a sum

in gross is created, the right and interest of a beneficiary may be assigned.

This provision of the statute applies only to rents and profits or to sums in gross payable out of real estate, although, by a subsequent statutory provision, the income of personal property is placed on a similar footing and subjected to the like rules : *Clute v. Bool*, 8 Paige, 85.

The question is, therefore, presented, whether the deed in question is such an assignment or disposition of the income as the 63d section has prohibited and rendered nugatory ?

The law having authorized the creation of trusts and especially trusts for the purposes specified in the 3d and 4th subdivisions of sec. 55, it became necessary to throw around them some guard against an improvident disposition which the beneficiaries of such trusts might be tempted to make of what was intended for their continuous support and to meet their constantly accruing and future wants, such beneficiaries being generally persons of improvident habits or under some condition of helplessness or dependence ; and, hence, the 63d section was enacted. It was probably intended moreover to support and give effect to the clause against anticipation, commonly introduced into deeds and wills, creating settlements for the separate use of married women, as to the effect of which clause nice and difficult questions were liable frequently to arise. See Kent's Com. 5th ed. and *Tullett v. Armstrong*, 1 Beavan's Rep. 1.

No such clause appears however in the deed in the present case ; and the other branch of the mischief, which it was the policy of the 63d section to guard against, seems to be equally inapplicable and foreign to the present purpose. The effect of the deed, appointing one half of the net income of the husband, is not to break up the trust : for the object of the trust is not thereby essentially or materially changed. The trust is still to endure. The trustees are to go on receiving the rents and income and making the application thereof in moities according to the direction she has given and the appointment she has made—all of which is in conformity with the power conferred on her.

This is very different from a sale of her interest under the trust. It is not a parting with the continuous and constantly

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accruing benefit it was intended to be to her, for a benefit in gross or an anticipation of all the benefit of the trust and a termination of it, so far as she is concerned.

The opinion expressed by the chancellor in *Gott v. Cook*, 7 Paige, 538 and by Mr. J. Cowen in S. C. in error, 24 Wend. 667, appears to me to favor the distinction which I make between putting an end to the original beneficiary's interest under the trust, thereby virtually defeating the object of it, and the doing of that which is only an appropriation of the benefits resulting from it in a manner compatible with its object and its creation. I think the latter is the sense in which this deed is to be regarded; and, consequently, that it does not fall within the prohibition of the 63d section.

The other objections taken to the deed depend on the circumstances under which Mrs. Cruger was induced to execute it.

She states in her answer (and in her cross bill the charges are substantially repeated) that having returned to the city, on the 18th of October 1841 from her country residence, she went immediately to the house of her cousin, Mrs. Kane, where she met Mr. Cruger and had a very painful interview with him. That at that time, as she believes, he had made up his mind to live apart from her and to obtain as large a grant as practicable of her income and for this purpose he engaged the services of Mr. Monroe, her brother-in-law. That Mr. Monroe, accordingly, alone or conjointly with Mr. Cruger, instructed Mrs. Monroe, her only surviving sister, to procure from her an appointment of one half of the income to the use of Mr. Cruger. That all the acts and proceedings of Mr. Monroe to accomplish that object were guided by Mr. Cruger, either directly or indirectly through the agency of Mr. Monroe. At the same time, by some indirect means, Mr. Cruger procured Mrs. Kane and Mr. Ogden to aid and assist him in his designs upon the income. That Mrs. Monroe, aided and seconded by Mrs. Kane and Mr. Ogden, addressed her and requested that she would settle upon Mr. Cruger one half of the income of her estate. To this she replied that, by virtue of an offer made in June previously through her counsel Mr. Strong and still subsisting, Mr. Cruger had the liberty to take nearly the whole of the

income and it was, therefore, unnecessary to apply to her for a smaller sum. (The offer in June alluded to involved a condition that, if accepted, she would live separate from him and had, therefore, been rejected.) That her sister, Mrs. Monroe, treated such reply with ridicule and derision, stating that she had no right to give the whole but was bound, in order to save herself from general censure, to give one half. That Mrs. Monroe, so aided and seconded by Mrs. Kane and Mr. Ogden, pursued the application for a settlement of one half of the income upon Mr. Cruger so unceasingly and in so harassing and importunate a manner as to leave her no peace or quiet. That she resisted the importunities of her sister to the utmost of her ability; but at length her powers of resistance wholly failed her and she yielded to the requisition of her sister and directed her counsel (Mr. Strong) to draw the required settlement. She further says that Mr. Strong accordingly drew up an instrument bearing date the 26th of October 1841, purporting to settle one half of the income upon Mr. Cruger for her life, instead of his life, which she executed, but which he refused to accept or receive.

That in this stage of the controversy she was again addressed by her sister, aided by her cousin and Mr. Ogden—that she was charged with duplicity in giving private instructions to her counsel to draw the instrument in such unsatisfactory form and was censured for unreasonable obstinacy and threatened with public odium; and with renewed and continual importunities, she was at last compelled in order to secure her tranquillity, to agree to make the settlement upon her husband of one half of the income during his life. That having so yielded, she sent for Mr. Strong and caused instructions to be given to him to prepare the deed of settlement accordingly. That the draft was prepared and submitted to Mr. Cruger, who instead of acquiescing in it, proposed a different deed of settlement, but on being informed that his proposed deed would not be executed, he finally, after considerable hesitation and on or about the 17th of November, signified to Mr. Strong that he would accept as satisfactory the deed prepared by him; whereupon it was engrossed and she executed and acknowledged it under date

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of the 19th of November 1841 and sent it to Mr. Strong who delivered it to Mr. Cruger.

She then denies that Mrs. Monroe, Mrs. Kane and Mr. Ogden or either of them had any right to suppose that the deed could or would form a basis just, reputable or otherwise of a re-union between herself and her husband ; on the contrary she says it necessarily formed a cause of continued separation, inasmuch as she had uniformly declared that she could not live with her husband so long as he persevered in possessing himself of a legal right to any part of the income of her estate.

That in the summer previous he had declined to receive a settlement on the condition that she was to live apart from him and yet in order to secure the co-operation of her sister, and cousin and to avoid the odium of accepting a settlement on such disreputable terms he held out to her sister and cousin the idea that such settlement when made would satisfy his mind, restore harmony and thus lead to a re-union between them ; at the same time he well knew that she had determined not to live with him under such circumstances.

She then says that the deed was not a free and voluntary act on her part—that it was obtained in opposition to her will and by the persevering and vexatious importunities of her husband and his agents—that it was obtained fraudulently against good faith and contrary to the true intent and meaning of what she claims to have been an ante-nuptial agreement and the husband's deed of 29th of June 1833. That although no physical force was employed to compel her to execute the instrument and admitting, as she does, that at the time of executing it she was under no personal restraint or duress and that she executed and acknowledged it with all the form and ceremony of a free and voluntary act, yet she says it was by undue persuasion and coercion growing out of his importunities and persecution of her for years and his threats that he would continue to destroy all her peace, comfort and happiness until she made such a settlement of her estate upon him as he should be content to accept, that she was brought to execute it.

Such are alleged to have been the means resorted to and practised upon her to obtain the deed. If true, there can be

no doubt as to the duty of this court in regard to the transaction. The deed could not be allowed to stand, much less would the court lend its aid in carrying it into effect. And here I may remark that much of what is thus alleged against the *morale* of the deed is either in denial of or responsive to statements put forth in the original bill calling for an answer under oath. The burthen of disproving these denials and responsive assertions therefore rests upon the husband and to this end he has called upon Mr. and Mrs. Monroe and Mr. Ogden for their testimony respecting the part taken by them as well as by Mr. Cruger himself in bringing about this arrangement and deed of settlement. Although these three witnesses are the persons chiefly implicated as conspiring with Mr. Cruger in this business, yet they are competent to testify and their testimony must be believed unless there is other evidence to refute their statements or upon the face of their own testimony it shall appear to be incredible.

Both Mr. and Mrs. Monroe freely admit in the course of a long and searching examination that often and on various occasions during a series of years prior to the separation of the parties in June 1841, they did interfere and by their advice and influence endeavored to prevail on Mrs. Cruger to make a permanent and irrevocable settlement upon Mr. Cruger of some large portion of the income of her estate. That this they urged upon her frequently when the subject of her income became a matter of discussion and controversy between them so as to threaten the loss of her domestic peace and happiness and to become painful to the feelings of those so nearly and dearly connected with her as were Mr. and Mrs. Monroe and family—that this was done both verbally and by written communications in the most urgent and persuasive manner, but was always most kindly meant, from a belief that her own happiness would be promoted by it and from a wish to see her placed upon high ground with respect to her husband and the opinion of the world.

When Mrs. Cruger came to town in October 1841 and did not go to reside with her husband at 55 Broadway, where he then was, these efforts were renewed by Mr. and Mrs. Monroe and particularly by the latter, in the hope of induc-

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ing Mrs. Cruger to make the settlement and return to and reside with her husband and thereby conform to the wishes of her best friends. Mrs. Monroe is asked upon her cross examination to give the substance of the conversation which it appears she had with Mrs. Cruger on that subject two or three times shortly after she came to town, partly at Mr. Monroe's house, 30 Varick street, at one of which she thinks Mr. Cruger was present and also Mrs. Kane and at another Mr. Ogden and Mrs. Kane were present. She says the conversations were not very long, at least not all of them. She did earnestly entreat her sister to make the deed and place herself on high ground. It was her sister she thought of, to make right. The conversation most deeply impressed on her mind was one held in Mrs. Kane's house, when she said, "My sister, only do right; put yourself on high ground and divide your income with Henry, giving him half that you cannot take back; then try and if you are not happy with Henry and be not contented I will give him up and go to you." In answer to a further interrogatory she says she expressed herself to this effect: "Mrs. Kane, Mr. Ogden and Mr. Whetten, every one of us that loves you, wishes you, Harriet, to do this—do, Harriet, for all our sakes." She further says—"I did not say to her, 'You cannot maintain your own respectability or that of your relatives without making it;' I had no view but for my sister. I urged her from the bottom of my heart to do what I asked of her. I used no argument but affection." In relation to the charge that these efforts of Mrs. Monroe's to procure a deed from her sister were stimulated by Mr. Cruger through the instrumentality or agency of Mr. Monroe, who instructed, guided or directed his wife's movements in that respect, Mr. Monroe expressly declares that Mr. Cruger never at any time engaged his services or secured his agency to obtain for him half of the income of Mrs. Cruger's estate or that he alone conjointly with Mr. Cruger ever instructed or directed Mrs. Monroe to procure from her sister such a grant. He says, that at no time whatever did anything pass between himself and Mr. Cruger on the subject, except when he spoke to Mr. Cruger about having some arrangement made that should be definite and unchangeable respecting the income—

at which times Mr. Cruger declared himself disposed to leave the whole matter to Mrs. Cruger and her friends. He says, moreover, that in the frequent conversations between himself and Mrs. Monroe he found that their views corresponded in relation to Mrs. Cruger; and that he never did advise Mrs. Monroe to use her influence and power of persuasion with Mrs. Cruger to effect any object with her; that Mrs. Monroe would attempt nothing of that sort which was not in accordance with her own views and her own feelings of affection towards her sister; that whatever he, Mr. Monroe, had done towards influencing or persuading Mrs. Cruger into a settlement, was done out of regard for her and her happiness; and most generally without the knowledge or concurrence of Mr. Cruger, except that Mr. Cruger had always declared that he would cheerfully concur in anything her friends might decide upon.

It is unnecessary for the present purpose to go more at length into the testimony of these two witnesses. What I have thus stated comprises the substance of all that I deem material to show the character and kind of influence which they appear to have exerted with Mr. Cruger in producing the result complained of by her.

The testimony of Mr. Ogden in regard to the character of his interference and advice is not very different. He, it appears, was an old and intimate friend of the Douglas family. One who could have had no motive for advising Mrs. Cruger in any thing except that which he honestly and sincerely believed to be right and promotive of her happiness and welfare. He was in New York during the whole of October and as late as the 10th of November 1841—on which day he embarked for England. In October and at least a fortnight before he sailed, he met Mrs. Cruger at Mrs. Kane's in Varick street. Mrs. Monroe was also there. He had taken leave of the ladies. Mrs. Cruger followed him to the door and as he was on the steps going away she urged him to return and converse with her on the subject of her existing difficulties with her husband and to give her advice. At her pressing solicitation, resisting it, however, for some time, he agreed to listen to her story and did return into the house and had a long conversation with her. Mrs. Kane and Mrs.

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Monroe were present. The conversation most to the point, he says, was her declaration that she had always intended to settle the whole of her income upon her husband, revocable at her pleasure. He, Mr. Ogden, gave it as his opinion that a certain part of her income or a certain sum should in justice be settled on her husband during his life. After a great deal had been said, she agreed that the settlement should be of one half of her income and solemnly declared that she would carry it into effect. She said, "Mr. Ogden, I will sit down this very night and write orders to my solicitor to do so." He told her such haste was unnecessary, that to-morrow or the next day, after she had reflected on it, would answer the purpose. "I repeatedly told her," (he continues) "that my only cause for giving her this advice was my friendship to her and to set her right before the world. I told her that I frequently had heard it the subject of conversation and that she was blamed for the conduct she had pursued. We parted on this occasion on the most friendly terms."

He further says, on his cross-examination, that in the course of the conversation he told Mrs. Cruger that he was speaking to her as her friend and not as the advocate of Mr. Cruger, in whom he felt no comparative interest; that the advice he gave her was from a conviction in his own mind that it was right and that he gave it to her that she should be enabled to take a high stand before the world. In answer to the question, "Did you at that time advise that the settlement should be for his (Mr. Cruger's) life?" He says, "I did most distinctly;" and he was led to do so from a belief that no permanent amicable adjustment could be made which rested on the sole will or caprice of the party making the settlement.

It was in pursuance of this advice that Mrs. Cruger gave directions to Mr. Strong, her solicitor, to prepare the deed which was drawn and signed by her under date of the 26th of October 1841, purporting to be for her own life and which was rejected. Afterwards and on the 8th or 9th of November, Mr. Ogden had another interview with Mrs. Cruger at her brother's (Mr. William Douglas') house in Park Place. He there entered into a further conversation with her in which

he told her that he had understood a deed had been made out in favor of Mr. Cruger during her life and inquired whether she understood that to be the meaning of the advice he had given her. She replied that, in the directions to her solicitor, she had not ordered him to make out the papers in that way. He then remarked, in that case the solicitor was unworthy of her confidence, as he had presumed to make a change in her intentions. She persisted, however, that the papers should continue as they were drawn. On that account the conversation became an animated one. Mrs. Cruger was greatly excited, walked the room and expressed herself very strongly and in terms highly derogatory to the character of her brother-in-law, Mr. Monroe. To which the witness replied with some warmth, though in other respects, he says, he spoke plainly in the language of truth without passion or feeling. In reply to her exclamation that "all the world had turned against her and that I even had joined her enemies," he said, "No, Mrs. Cruger, you are your own worst enemy,—if any friend, however dear to you, ventures to differ in one single point from your opinion, you set them down at once as an enemy."

The witness says further, it was an angry conversation towards the close of it. It can hardly be said to have terminated amicably, for she persisted in her intentions and he had his views on the subject which were opposite to those entertained by her. Up to the time he parted with her, he understood that she did not yield her assent to making the settlement for his (Mr. Cruger's) life. Her brother, William Douglas, and Miss Bleecker were present during the conversation, but took no part in it of any moment.

With regard to the last interview, it appears to have been brought about solely at the instance and upon the invitation of Mrs. Cruger. Mr. Ogden did not seek it nor does it appear that Mrs. Kane, Mrs. Monroe or Mr. Cruger were at all privy to it. Mr. Ogden had shortly before heard, through Mrs. Kane or Mrs. Monroe or both of them (between the 1st and 8th of November) of the making and tender of the deed of the 26th of October and had expressed his astonishment at its being limited to her life, but has no recollection of having seen or conversed with Mr. Cruger on the subject be-

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tween the time of the first and last conversations with Mrs. Cruger or of having seen Mr. Cruger and Mrs. Monroe together during that interval.

It appears moreover from his testimony, that in the summer of the preceding year (1840) he, Mr. Ogden, had visited Mrs. Cruger at Henderson upon her invitation and there the subject of a settlement and adjustment of the difficulties with her husband were discussed; and at which time he had very frankly expressed his opinion in favor of a settlement of a part of her income upon her husband that should be irrevocable as the only means of reconciling them and of enabling them to live amicably together and had advised her against making a settlement of the whole income during her pleasure as she repeatedly said it was her intention to do. To the question, "Did Mr. Cruger at any time request you to exert any influence with Mrs. Cruger on the subject of those difficulties?" The witness answers, "Never! It was at the solicitation of Mrs. Cruger alone and as her friend that I gave the advice." The question thus put and answered relates to every instance in which Mr. Ogden conversed with Mrs. Cruger and gave advice in relation to her difficulties and the best mode of settling and avoiding them in future. So far as he was instrumental in the matter and so far as his advice or opinions may have influenced her to make a settlement of one half of her income and to make that settlement irrevocable and that too for her husband's life instead of her own, Mr. Ogden certainly exculpates Mr. Cruger entirely from all agency in bringing that influence to bear on her mind. The same may be affirmed of the testimony of Mr. and Mrs. Monroe in respect to the part which they took either conjointly or separately to induce Mrs. Cruger to make such a settlement. Neither of the three acted with any view to serve any mere selfish purposes of Mr. Cruger by procuring for him one half of the income of the estate. It is impossible to believe that they who stood in the relation that these parties did to Mrs. Cruger, including Mrs. Kane her intimate friend and near relative, could have been actuated by such a motive even if they had not told us of higher and nobler motives of action proceeding from feelings of friendship and affection towards

Mrs. Cruger and from a desire to serve her in that which would contribute most to her welfare, her own domestic peace and happiness and secure to her the high stand which she had all along occupied in society and before the world and in the estimation of her numerous friends. To this end and from such motives they were induced to exert their influence and to persuade Mrs. Cruger to make such a deed of settlement as she finally executed. In so doing they appear to have been governed by considerations altogether personal to Mrs. Cruger, intending to benefit her, though at the same time it could not fail to benefit her husband; yet he was not nor were his interests the object of their solicitude. He was but a passive party, ready to abide by whatever should be done by her that her friends might sanction and approve.

It is true he was so far active as to reject the deed of the 26th of October, but that was because it was not in accordance with the agreement and the solemn promise she had made. It is true, moreover, that he proposed the form or draft of a deed such as he understood had been determined upon, but finding her unwilling to execute any other than her solicitor should prepare, he yielded and accepted the deed of the 19th of November. Under these circumstances can it be said that Mr. Cruger succeeded in obtaining it by undue means? That he took no active measures to obtain it seems to me abundantly proved; and the leading charge of the answer, that he enlisted her friends in his service, prevailed on them to interfere and exert their influence and, finally, through their instrumentality guiding and directing their movements, succeeded in bringing about the result, so far from being supported by any evidence is, in my judgment, completely disproved, not only by the positive testimony which I have quoted but by strong presumptive evidence which the circumstances of the case, the relations which the parties implicated stood in towards Mrs. Cruger and their highly respectable and honorable characters unquestionably furnish. There is no ground, therefore, for imputing to Mr. Cruger the exercise of any undue influence, coercion or misconduct in obtaining the deed, either by himself or through the medium of other persons instigated by him or whose officiousness he had secured.

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The question still remains, however, whether executing the deed under the advice and pressing solicitations of her friends, urged upon her in the manner they have described and from motives like those before mentioned, she is at liberty to retract and avoid it?

In looking at the transaction with a view to this question it must not be forgotten that there was a dispute mainly attributable to the want of a formal and permanent marriage settlement. This dispute had before produced temporary separations; and now again it had resulted in a separation which threatened to be more lasting and in which the wife herself had chosen to be the party to leave her house and to keep herself aloof from her husband, he remaining ready to receive her whenever she might return. In the hope of bringing about a re-union and restoring harmony, her near relatives and other intimate and personal friends interpose their kind advice or she seeks advice from them. Their advice she determines to be governed by. She nevertheless waives and at length recedes. Her friends chide and entreat and importune until she is brought back to her first resolve. She then executes the deed and acknowledges it in a deliberate manner before a proper officer and in the presence of a brother, who must have known most, if not all, of the circumstances which led to it; and he and a sister-in-law sanction the act by their subscription as witnesses. Her husband was not present to overawe her. Her importunate friends were not there surrounding her—one of whom was on his way to England. At that time she was free to act as she pleased; unconstrained, except so far as she may have felt bound in honor and conscience to fulfil the promise she had made to them or was afraid of again incurring their displeasure by refusing to execute the deed. If the former was the case, she can hardly be allowed to say that she executed it against her will and the convictions of her own mind; and the latter will avail but little as an excuse for one who is proved to be "remarkably pertinacious in her opinions, not easily persuaded and certainly not to be intimidated from them."

The deed, moreover, is but a reasonable settlement of this family matter. There is nothing inequitable or unconscio-

nable in its provisions. Such a deed, free from fraud, though a voluntary one, yet made with a view of effecting a family settlement, a court of equity will seek to uphold rather than to destroy for obvious reasons of public policy as well as for the sake of the peace of families.

This deed has not been attended with the good results which were expected from it by her friends but has rather had the effect, as it would seem, to estrange her the more from her husband and in some degree to sever the ties of friendship and affection between herself and sister, yet this furnishes no argument against the validity of the deed nor any sufficient ground for not giving immediate effect to it. All this may have proceeded from some idiosyncrasy of mind that time may overcome—and the day may possibly not be far distant when the object of her friends in recommending this deed of appointment may be fully realized, notwithstanding the assertion in her answer that they had no right to suppose it would form the basis of a re-union between her and her husband, since she had uniformly declared that his acceptance of an irrevocable power over any part of her estate or its income would be the cause of a continued separation on her part. A re-union, however, was but one of the objects they had in view. If that failed, there was another which would be accomplished by her settlement of one-half of the income upon her husband. It would show her generosity and magnanimity and in that respect “set her right before the world.”

There is another point in respect to Mr. Cruger himself which must be briefly noticed. He is charged with obtaining the deed fraudulently and in bad faith, well knowing that it would not be the means of restoring harmony between them. This is answered by the evidence showing that he was but a passive party and had no hand in procuring it other than as a mere recipient when the deed was offered and sent to him. But the charge of fraud and bad faith goes farther. His mere acceptance of the deed and his attempt to claim any rights under it are alleged to be contrary to good faith and the true intent and meaning of an ante-nuptial agreement and the deed of the 29th June 1833 consequent upon it.

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In the former part of this opinion I have expressed my belief that there was no ante-nuptial agreement by which the property and its income were to be settled exclusively upon and to the use of the wife; and it is sufficient to say, with respect to the husband's deed of the 29th June, that it contains in itself a power of appointment in the wife and that there can be no fraud or bad faith on his part in assuming or claiming rights purporting to be conferred upon him by any deed executed in pursuance of such power.

In examining this important and to the parties deeply interesting case, there are many facts and circumstances scattered throughout a large mass of testimony and numerous letters and papers made exhibits in the cause, which have given rise to much ingenious and elaborate discussion by the very able counsel on both sides. These have not escaped my attention; but it is unnecessary to present them here at length. They relate to matters which doubtless have had an influence upon the motives and actions of the parties in this unhappy domestic controversy and especially as inducing Mrs. Cruger to undertake the repudiation of her deed after having quietly acquiesced in and abided by its provisions for a considerable length of time. It has been strongly put by Mr. Cruger's counsel—and there is reason to believe from the evidence that this attempt is owing to the officious interference of an individual whose calling should have led him to holier and better purposes than the fomenting of domestic strife and the encouragement of devastating litigation; but with this I have nothing to do.^(a)

A decree must be made establishing the deed of the 29th June 1833 and the deed of appointment of the 19th November 1841 and holding the trustees to accountability to Mr. Cruger for an equal moiety of the net income of the estate.

(a) The name of the minister here referred to no where appears in this opinion. The reporter deems it right to say this, because the names of clergymen are to be found in the course of this decision.

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BIBBY

v.

GOUVERNEUR S. BIBBY and wife v. SAMUEL L. GOUVERNEUR. GOUVERNEUR.
NEUR *et al.*

Where a resale is ordered and that the defaulting buyer make up any deficiency, he will not be let up merely on account of a variation of the original terms of sale in regard to the per centage of deposit—especially where he attends on the resale and is a bidder.

MASTER'S sale of mortgaged premises, at which the defendant Samuel L. Gouverneur bid off the property at seventeen thousand four hundred dollars; but he made default in regard to completing his purchase. An order was made on default for a resale and that he make good the deficiency. At the ultimate sale, T. Cadwallader bought the property for fifteen thousand five hundred dollars. By the conditions of the first sale a deposit of seven and a half per cent. was to be made; while by those of the last sale, the deposit was to be two per cent. A motion was made to open the order taken by default on such equitable terms as the court might see fit to grant. An affidavit in support of the motion was made by Mr. Van Cott on behalf of his client Gouverneur. That the latter was now absent from the state and did not know, when the order against him was made, that the terms of sale were in any way changed.

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*Sale.
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It appeared that he attended on the resale and bid.

Mr. *J. M. Van Cott*, for the motion.

Mr. *James Humphrey*, in opposition.

THE VICE-CHANCELLOR:—There is no sufficient ground for relieving the defendant from the liability imposed upon him. He has brought it upon himself by his own acts and acquiescence in the resale on his account. His personal attendance and bidding for the property at the resale without objection as to the terms is to be taken as a waiver of all objection on that score.

His present motion must be denied, with costs to be taxed.

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v.
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NEWELL v. BURBANK and another.

Where a complainant files a judgment-creditor's bill and a retaxation of costs takes place in the court below whereby the judgment becomes less than \$100, he will not be allowed to dismiss his bill without payment of costs here.

Sept. 24,
1844.

Jurisdiction.

THE complainant had obtained a judgment of non-suit against the defendant in an action at law; and having, on notice but while unopposed, taxed his costs at an amount exceeding one hundred dollars, he perfected his judgment for that sum and had an execution issued and returned *nulla bona*. He then filed the usual judgment-creditor's bill. A retaxation, in the meantime, was had; and the costs at law (instead of standing at the above sum) were taxed down to about seventy five dollars. The complainant moved, under the circumstances, to be allowed to dismiss his bill without costs.

Mr. *Martindale*, for the complainant.

Mr. *Gray*, for the defendant.

THE VICE-CHANCELLOR :—I do not see how I can grant this application on motion. It is not like the case of a defendant taking the benefit of the bankrupt act; for there the defendant causes the circumstance which allows the complainant to move; but here, the act is the complainant's own. It is true that the statute is imperative as to dismissing a suit brought for an amount less than the jurisdictional sum. "The court of chancery," says the statute, 2 R. S. 173, § 37 "*shall* dismiss every suit concerning property where the matter in dispute, exclusive of costs, does not exceed the value of one hundred dollars, with costs to the defendant." I am satisfied that this section is only to be applied on the hearing of a cause. Let us then look at the section which has reference to a complainant dismissing his own bill: *Ib.*

613, § 1. "Upon the plaintiff in a court of equity dismissing his own bill or petition or upon the same being dismissed for want of prosecution, the plaintiff shall pay to the defendant his costs to be taxed; except in those cases where, according to the practice of the court, costs would not be awarded against such complainant upon a decree rendered on hearing of the cause." Now I cannot say, in this stage of the cause especially, that the present is a case where costs would not be given against this complainant. Nor do I think this case comes within the equity which permits a complainant to withdraw his suit without paying a defendant's costs.(a)

[An order was ultimately entered whereby the bill was to be dismissed and the defendants were to have their costs, while the costs as retaxed on the judgment were to be applied by way of set-off. But this was rather an arrangement or concession of the parties than the clear order of the court.]

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SAFFORD v. DOUGLAS, *et al.*

GRAY and CROSBY v. DOUGLAS, *et al.*

Where different judgment-creditors file their bills on the same day, he who first gets his pleading on file has priority of payment.(b)

PETITION of Joseph Brice Smith, receiver of the estate and effects of Samuel T. Armstrong and James B. Douglas, for instructions as to the manner in which he should distribute funds in his hands.

(a) And see *Smets v. Williams*, 4 Paige's C. R. 364: *Church v. Ide*, 1 Clarke's Ch. R. 494.

(b) And see *Fitch v. Smith*, 10 Paige's C. R. 1.

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The difficulty was to decide upon a priority between the complainant John L. Safford and the complainants Gray and Crosby. They had both filed judgment-creditor's bills on the same day. The solicitor for Gray and Crosby showed, by deposition, that on account of the sheriff having made a mistake as to the court in which the *fi. fa.* should have been returned, the solicitor for Safford got his bill on file first, adding "that the difference of the time of filing the aforesaid bills was not, as deponent believes, more than five minutes."

A question was also attempted to be started between individual and partnership creditors.

Mr. *Clarkson*, for the complainants Gray and Crosby.

Mr. *A. Thompson*, for the complainant Safford.

Mr. *J. B. Smith*, solicitor in *pro per*.

Oct. 21.

THE VICE-CHANCELLOR :—It seems that the courts are bound to look to the fractional parts of a day in order to determine the priority of liens by judgment and executions where several have been obtained on the same day.

The revised statutes, vol. 2 p. 359 § 3, speak of "the time" of docketing a judgment (not of the day) as giving a lien on lands; and executions take effect, as to personal property, from the hour and minute they are received by the sheriff; and they are to be paid in the order in which they are received—the exact time being noted upon them by the officer. The case of *Lemon v. Staats*, 1 Cowen 592, is a direct and explicit authority for the rule; and see 2 R. S. 365, § 13.

And the same rule is as applicable here, in respect to the filing of creditors' bills which create an equitable lien, as at law with respect to judgments and executions. In *Corning v. White*, 2 Paige's C. R. 568, the chancellor recognizes it as well settled that the creditor who first files his bill here, to reach the defendant's property which cannot be sold on an execution at law, obtains a preference.

This preference arising from his priority in point of time

becomes a matter of legal vested right, which even a court of equity will not disturb : *M'Dermutt v. Strong and others*, 4 J. C. R. 687.

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The complainant, Safford, obtained it, in this instance, by filing his bill and serving his subpoena a few minutes before the other complainants Gray and Crosby. It was Safford's good luck and not the others' fault that he got ahead of them in the race. They have to blame the sheriff for being delayed in finding the execution returned before they could present their bill for the injunction ; but this accident or mistake of the officer's is not a sufficient ground for depriving Safford of his priority.

The other point between the partnership creditors and the individual creditor I determined on the hearing of the petition.

Order : That the complainant, John L. Safford, be first paid in full and next the complainants Gray and Crosby and so on in the order in which the several creditor's bills were filed.

MEL, COE and ANDERSON v. HOLBROOK and others.

J. G. A., being proprietor of the Bank of F., solicited the firm of M. C. & A. for their drafts ; and, on obtaining, discounted them, paying in the then current notes of the bank. Subsequently and before the drafts matured and while M. C. & A. still held the greater portion of the bank notes, the bank failed ; and J. G. A. assigned its assets ; and, amongst them, the drafts to L. H., in trust for creditors. L. H. as holder sued M. C. & A. at law on their drafts at maturity : *Held*, that here was a case of equitable set-off and an injunction should issue to restrain the action at law.

MOTION for an injunction to restrain the defendant Lowell Holbrook from further proceeding at law upon the subject-matter of the suit now prosecuted by him in the Superior court of the city of New York against the complainants.

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Set-off.
Injunction.

The bill showed that the complainants composed the mer-

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cantile firm of Mel, Coe and Anderson in the city of New York; that one Edwin G. Booth became the proprietor of the bank of Florida, a bank incorporated by the legislature of the territory of Florida and established at Tallahassee; that, being such proprietor, the said Booth conducted and carried on the business of the said bank at Tallahassee and, in the course thereof, issued and put in circulation a large amount of the bank bills and circulating notes of the said bank and which said notes were, upon the face of them, made payable at the office of David S. Kennedy in the city of New York and were signed by the said Edwin G. Booth as the president of the said bank. That some time in or about the month of December one thousand eight hundred and forty-three, the said Booth sold out his interest in the said bank to the defendant James G. Graham, who thereupon became the proprietor of the bank and conducted and carried on its business at Tallahassee and, in the course of its business, issued and put into circulation a large amount of the bank bills and circulating notes of the said bank and which said notes were also made payable at the office of the said David S. Kennedy in New York and were signed by the said Graham as president. That on the transfer of the said bank from the said Booth to the said Graham, the latter (as the complainants were informed and believed) agreed (and such they charged would be the case by operation of law) that he and the said bank would protect and pay the outstanding bills of the said bank which had been issued by the said Graham and signed by him as president.

The bill further showed that, in the month of March one thousand eight hundred and forty-four, one of the complainants, John George Anderson, being then at Tallahassee, the said James G. Graham solicited him for drafts on his said house of Mel, Coe and Anderson and offered to discount the same. That the said James G. Anderson accordingly, on behalf of his said firm and on the twelfth day of March in the year one thousand eight hundred and forty-four, drew two certain bills of exchange bearing that date upon his said firm in New York in favor of the said James G. Graham, the one at sixty days date for two thousand dollars and the other at sixty days sight for three thousand dollars

and the same were thereupon discounted by the said bank of Florida; and the said John George Anderson thereupon received the proceeds of the discount of his said draft for three thousand dollars from the said bank of Florida in the bank notes of the said bank. That the aforesaid bank, on receiving the said drafts, sent them forward for collection, on account of the said bank, to the said David S. Kennedy; and that the same were duly presented to the complainants and by them accepted. That sometime in the month of April in the year one thousand eight hundred and forty-four the said David S. Kennedy ceased to redeem the bank notes of the said bank of Florida and thereupon the said bank suspended its payments and had ever since refused and been unable to meet its notes and other obligations and were insolvent. That shortly after the suspension of the said bank, the said David S. Kennedy, having covered himself from funds in his hands for his advances and liabilities in relation to the said bank, did, by order of the said bank, transfer all its remaining assets then in his hands, including the aforesaid two acceptances of the complainants to the defendant Lowell Holbrook of the city of New York, merchant, in trust to realize the assets and apply the proceeds in or towards the payment of the debts of the said bank and that he still so held such acceptances. That the complainants still held and had held ever since the discount of the two aforesaid drafts on them, two thousand one hundred dollars of the said bank notes of the said bank of Florida, signed by the said James G. Graham, being a portion of the identical notes received by the said complainant John George Anderson on the discount of the said two drafts by the said bank of Florida; and that they also then held and did, before the maturity of their said two acceptances or either of them and also before the said transfer of their said two acceptances to the said Lowell Holbrook and also before the commencement of the action upon them in the superior court, hold three thousand five hundred dollars of the said bank notes of the said bank belonging to them and received by them in the regular course of business, all of which were signed by the said James G. Graham as president of the said bank. And the complainants claimed the right to set off against

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them their said two acceptances. The complainants then set forth the action at law commenced against them on the said two acceptances by the said Lowell Holbrook as plaintiff showing that the same was not at issue. *Prayer* : That, by a decree, the complainants might be allowed to set off the aforesaid bank notes against their said two acceptances or that such acceptances might be declared void in whole or in part ; and, for further relief. And also for an injunction to restrain further proceedings in the action.

The affidavits, in opposition to the motion, showed that the bank notes were available at the time they were taken by the complainants and that they might have passed them away for their full amount, if they had been so disposed ; but these depositions did not controvert the main facts set out in the bill.

Mr. *G. Griffin*, for the complainants.

Mr. *J. B. Wright*, for the defendant Lowell Holbrook.

Feb. 3. THE VICE-CHANCELLOR :—This appears to be a case of an equitable set off within the principle of *Lindsay v. Jackson*, 2 Paige's C. R. 581. *Order*, that the injunction be made so as to become an absolute stay of proceedings in the suit at law.

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SMITH
v.
WYCKOFF.

SMITH and another, Executors of SMITH v. WYCKOFF,
et al.

Executors, in pursuing a debt, made a person a party who they had a fair right to suppose held a claim. The latter denied holding such a claim and yet met every allegation of the bill, thereby making a long answer. On an application, by the complainants, to dismiss the bill without costs: *The Court* restricted such defendant's costs to a disclaimer and to the ordinary costs of solicitor and counsel fees of opposing the motion.

EDWARD SMITH had a debt against Lambert Wyckoff; and the latter, by his will, made it a lien upon his real estate—as he also did a bond debt which he had given to Henry Onderdonk. Lambert Smith then died; as did his creditor Edward Smith. The executors of the latter filed the present bill to obtain payment of the debt and made the said Henry Onderdonk a party, supposing him still to be the holder of the bond debt. An answer on oath was waived. He put in a full answer, however, showing that he had not the bond and was not such creditor. A motion was now made that the complainants might be allowed to dismiss the bill as against the defendant Henry Onderdonk without costs.

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*Practice.
Dismiss-
ing bill.
Costs.
Executors.*

Mr. *H. Nicoll*, for the complainants.

Mr. *H. G. Onderdonk*, (reading affidavits) in opposition.

THE VICE-CHANCELLOR :—In disposing of this motion, the court can have nothing to do with the circumstances detailed in the opposing affidavits, especially that of the solicitor Mr. *H. G. Onderdonk*, for the purpose of showing that the executors of Peter Wyckoff are the authors of this suit and have employed the solicitor to bring it and that the executors of Edmund Smith are only nominal complainants. It is not true that they are but nominal complainants, for it abundantly appears that they have a real substantial interest in the prosecution of this suit by virtue of the five thou-

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sand dollar note which has come to their hands as executors and which it is their duty to enforce. They must, therefore, be the actual complainants who have undertaken this suit, though the result of it may be to relieve the estate of Peter Wyckoff, deceased, in the hands of his executors, from the payment of this and other debts; and, hence, may have been set on foot at their instance and request. In framing this bill, it is easy to perceive how the complainants fell into the mistake of making Henry Onderdonk a party defendant. He is spoken of in the will of Peter Wyckoff as his bond creditor of fifteen hundred dollars, instead of Margaret Schenck to whom the bond was, in fact, given. The complainants now wish to correct this mistake by dismissing their bill as to Henry Onderdonk and amending it by bringing in the real party in interest in that bond. And the question is, what costs, if any, are the complainants bound to pay Henry Onderdonk?

I think they are bound to pay him some costs, though bills by executors or administrators will sometimes be dismissed without obliging them to pay any costs to the defendant. In this case, however, it would operate as a hardship on the defendant if, without his fault and through mere error or mistake in making him a party, he should be left to pay all his own costs. It was prudent and right and proper in him, on being served with a subpoena, to appear and answer a chancery bill which he knew nothing about, to employ a solicitor to appear and attend to the matter for him. But when he came to see a copy of the bill as served upon his solicitor and observed that his answer thereto was waived (for the bill contains an express waiver of the oath of all the defendants in answering) there was not the least occasion to put in an answer of forty folios in length answering every allegation and charge of the bill. There was neither necessity nor propriety in it; and his solicitor should have advised him that, as he had no interest in the subject-matter of the suit and was not called upon to answer the bill, all that it became necessary or proper for him to do was to put in a disclaimer, stating that he held no such bond and claimed no interest as a creditor of Peter Wyckoff, but that Margaret Schenck was such bond creditor as he had

reason to believe. The answer does, in fact, state this ; but it contains a great deal more, which could only have been introduced for the purpose of increasing the amount of costs for somebody to pay.

A formal and proper disclaimer might have been comprised in only five folios and beyond five folios this defendant's solicitor ought not to be paid.

Order : That the complainants have leave to dismiss the bill as to Henry Onderdonk, on payment of his costs to be taxed, including the putting in of his answer to be charged as a disclaimer of five folios only ; and adding brief and counsel fee upon the motion, but no charge for the affidavits read in opposition.

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MATTER OF
WATER COM-
MISSIONERS.

IN THE MATTER OF THE WATER COMMISSIONERS AND
PIERRE VAN CORTLANDT, *et al.*

Appraisers appointed to assess damages to the riparian owner arising from the diversion of the water of the river, should allow to a tenant of a mill (under such owner) the damages he will sustain.

Mode, recommended by the court, of assessing damages in favor of owners of unequal shares in different pieces of land and others on account of the diversion of water of a river.

Where the main body of water in a river has been controlled by a dam and turned and used by a mill for forty years and the dam and mill were maintained without objection, a perpetual right in such use of the water is thereby gained : unless a qualified right as to time is insisted on and proved by the party who attempts to narrow it. Even twenty years of such enjoyment would presume a grant.

The principles applicable to the use of river water, as stated by the court in *Wright v. Howard*, 1 Sim. & S. 190, recognized as in force here.

Where the fee of a mill under lease, using water turned from a river or a mill-site for future mill purposes, is devised with the addition of "with an equal proportion of water out of Croton River Dam," the gift of such proportion of water is as permanent as the gift of the mill.

Assessors acting under statute or by direction of a court to ascertain and report damages due to owners on account of the diversion of water, act properly in hearing evidence of prescription and grant, the better to ascertain rights and apportion accordingly.

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 ~~~~~  
 MATTER OF  
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~~~~~  
*River.
 Diversion
 of water.
 Mill.
 Mode of
 assessing
 damages
 on diver-
 sion of wa-
 ter.*


PETITION of Pierre Van Cortlandt and others, owners of lands contiguous to the Croton river, whose damages were about to be assessed at the instance of the Water Commissioners for and in consequence of the diversion of the waters of the river by means of the aqueduct.

The petition prayed that a final appraisement might be postponed until the decision of the court for the correction of errors could be had in a cause pending on a writ of error to the supreme court in the case reported, 1 Hill, 590, in relation to the rights of Philip G. Van Wyck as a residuary devisee to some of the lands; and until certain suits in partition, between different owners as tenants in common, could be carried through or the shares of infants could be sold for their benefit, so as to consolidate several of such rights and interests; and also, until by some decree or judgment of this court or some other competent tribunal, it could be ascertained and determined whether there were any rights by prescription to the use of the water on the southeasterly side of the river in favor of some of the owners on that side to the exclusion of other owners on the opposite side—or, that the appraisers might be directed to appraise the whole damages of the several owners of all the parcels holding as tenants in common, together in one appraisal, or the whole damages of the several owners of each respective parcel: to the end that the amount or aggregate of damages might be brought into this court and be here distributed amongst the several owners according to their respective rights.

Soon after the presentation of the petition of the decision of the court for the correction of errors on the writ of error above mentioned took place and copies of the opinions on which the judgment in the court below was reversed were laid before the vice-chancellor. That decision^(a) definitively established the title of Philip G. Van Wyck, as residuary devisee under the will of his deceased uncle Philip Van Cortlandt, to all the lands of which the testator had died seized which were not otherwise specifically disposed of by his will and codicil.

(a) Since reported 7 Hill's R. 346.

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Taking, then, the decision in the last mentioned case in connection with the facts set forth in the petition, the ownership or title of the several parties interested in the property affected by the diversion of the water of the Croton river appeared to be as follows: *First.* General Pierre Van Cortlandt was solely seized, as owner in fee, of six hundred acres of land lying along the northerly or right bank of the river, under the devise thereof to him in the will of his brother Philip Van Cortlandt, deceased, (and which was designated on the diagram annexed to the petition by the letter F.) *Second.* Philip G. Van Wyck was solely seized as owner in fee of the lot or parcel of land on the southerly or left bank of Croton river (designated on the said diagram by the letters A. A. and known as "Holman Mills.") It was the same property which had been devised by the will of Pierre Van Cortlandt the elder to the late Philip Van Cortlandt his son; and by the will of the latter to Philip G. Van Wyck—he being entitled thereto under the devise of the residue, according to the decision of the court above mentioned. *Third.* As to certain parcels on the southerly side of the river (designated by the letters B. C. and E.) the ownership was as follows: General Pierre Van Cortlandt had three undivided fourth parts of each parcel as tenant in common, consisting of his own original share in B. and C. under the will of his father and in E. under a deed from his father dated the sixth day of January one thousand eight hundred and thirteen and of the two other like shares of his sisters Mrs. Beekman and Mrs. Van Rensselaer, which they had conveyed to him by deeds of the twenty-seventh day of October one thousand eight hundred and forty-two. The remaining one-fourth of each parcel which had belonged, in like manner, to the other sister Mrs. Catharine Van Wyck, passed by her will made in the year one thousand eight hundred and twenty-seven in moieties—one moiety or half part thereof to her son, Theodorus for life, with remainder in fee to such of the children of Philip G. Van Wyck as should be living at the time of the death of Theodorus and the other half to Philip G. Van Wyck in fee simple, subject nevertheless to a power conferred upon the latter as executor to sell all or any por-


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tion of her real estate as he should think proper. In the exercise of this power, Philip afterwards sold and conveyed the whole of the mother's share in the parcels B. C. and E. and in the parcel D. hereafter referred to, as well as in other lands to his brother Theodorus; and thereby extinguished his own and his children's title and interest; and Theodorus became seized in fee, in his own right as purchaser, of what was previously his mother's undivided one-fourth part of the parcels B. C. and E.: and he, afterwards, dying intestate, the same passed by descent to his son Abraham and to his two grand-sons Walter Budd and Abraham Van Wyck Budd as his heirs at law, so that the petition was correct in stating (as it did) that Abraham Van Wyck was seized of an undivided eighth part and Walter Budd and Abraham Van Wyck Budd each of an undivided sixteenth part of the parcels designated by the letters B. C. and E. subject, however, to the right of dower therein of Mrs. Mary Van Wyck, widow of Theodorus Van Wyck. *Fourth.* As to the tract or parcel of land lying along the southeasterly or left bank of the Croton river above Quaker's Bridge and designated by the letter D. on the diagram, the title and ownership at present appeared to stand thus: Pierre Van Cortlandt, the elder, had devised this part of his estate, with other lands contiguous, to his five children, including Philip, as tenants in common in equal shares. Philip, by his will, as made in the year one thousand eight hundred and twenty-four, undertook to devise his one-fifth of the property to his brother Pierre and three sisters equally. If this devise had taken effect, they would each have become seized of an undivided fourth of the whole, instead of a fifth; but, by a codicil made in the year one thousand eight hundred and thirty-one, Philip revoked that clause of the will which would have given to them his one-fifth in question. In the codicil, he alluded to the fact that, since the making of the will, he had purchased the shares of his brother and sisters in most of the land lying south and east of the Croton river which had belonged to the estate of his father. But it did not appear from the petition or other evidence before the court whether Philip had bought or acquired the title of his brother and sisters' shares in the lands along or

immediately adjoining the river, (which were designated on the diagram by the letter D.) although it did appear that he bought their shares in some other lands not bounded by the river.

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In regard to the particular parcel D. lying along the river, the court, in the absence of all proof to the contrary, assumed the fact to be that Philip Van Cortlandt died seized of only one undivided fifth part thereof and (it being now a settled point that the general devise of the residue of his estate to his nephew Philip G. Van Wyck passed the title to all such lands as remained not specifically devised after revoking parts of the will by the codicil,) that this one-fifth did not descend to the heirs at law as property undisposed of by the will, but now belonged to Philip G. Van Wyck as such residuary devisee. It appeared, in the view of the court, that three of the other four-fifths belonging to General Pierre Van Cortlandt, namely, his own original one-fifth and the two which belonged to Mrs. Beekman and Mrs. Van Rensselaer conveyed to him by their deeds of the twenty-seventh day of October one thousand eight hundred and forty-two and that the remaining one-fifth, originally the undivided share of Mrs. Catharine Van Wyck, passed by her will in like manner as her one-fourth in the other parcels before mentioned and was included in the sale and conveyance from Philip G. Van Wyck to his brother Theodorus Van Wyck under the power of sale given by the will to Philip: so that here, likewise, Theodorus became seized in his own right as purchaser of his mother's undivided one-fifth of the parcel D. which he transmitted by descent to his son Abraham and to his two grand-children, the Budds. Of the lands along the easterly side of the river above Quaker's Bridge, therefore, Philip G. Van Wyck was then to be deemed the owner of one-fifth part; General Pierre Van Cortlandt of three-fifths; Abraham Van Wyck of one-tenth; and Walter Budd and Abraham Van Wyck Budd each of one-twentieth part. The shares of the three last named being subject to the right of dower therein of the widow of Theodorus Van Wyck.

Mr. A. L. Jordan and Mr. Voris, for the owners.

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Mr. D. B. Talmadge, for the Water Commissioners.

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THE VICE-CHANCELLOR :—(*After referring to the several pieces of property and rights of parties as before detailed.*)

These are the same pieces of property in relation to which damages are to be assessed under four of the orders made by this court appointing appraisers and all bearing date the eighth day of March one thousand eight hundred and forty-two. One of these orders comprises the property A. A. (*Holman Mill*, so called,) now ascertained to belong to Philip G. Van Wyck solely. The damage to this property will be estimated by itself, in the manner contemplated and directed by the order and be awarded to Philip G. Van Wyck as the owner of the fee; and if there be a tenant of the mill holding under a lease, the appraisers must determine how much of the damage such lessee will be entitled to receive for his loss during the unexpired part of his term; and the amount will be specified in their report accordingly.

Another order comprises the three pieces of property designated as B. E. and C. These all have the same set of owners; and, therefore, the appraisers may, if they shall think proper, estimate and report the damage to the whole in the aggregate as one piece of property; and, then, by an appointment, specify how much each owner shall receive out of the gross amount. But I think it will be best for the appraisers to take up each one of these parcels by itself and ascertain the amount of damage it has sustained; and, then, bring the whole together into one sum and make the apportionment amongst the several owners or, having ascertained the damage to each of these pieces of property separately, they can then proceed to apportion the respective sums amongst the several owners.

One of the orders comprises the property D. on the diagram; and directs the assessment of the damage done to this water front by the diversion. Of course, the appraisers will consider this separately from the other pieces of property along the river and make their report of the amount of damage which they shall find the owners here will sus-

tain, giving the aggregate amount; first and, then, the sum apportioned for each one to receive.

Another order relates to the damage done to General Van Cortlandt's land on the opposite side of the river, represented on the diagram by F. Here, again, the appraisers will take up the subject of his damage separately from any other and award to him individually, as the owner, such an amount as they shall find he is justly entitled to. But, here, it seems, an important question arises and on which an opinion is asked from the court by way of direction or advice to the appraisers, namely, whether General Van Cortlandt is to be compensated as the owner of the land on the northerly side for one half of the natural flow of the river or for less than one half? That General Van Cortlandt owns the land to the centre of the river and indeed the whole bed of the river some distance below the mills appears from the boundaries and description of the six hundred acres in the will of his brother Philip, devising the same to him. *Prima facie*, therefore, he became entitled to the use or benefit of all the waters flowing naturally and without obstruction over that part of the bed of the river lying within his bounds. But it may be that, at the time of thus acquiring title, the whole of the water which, in its natural course, would have passed on his side, did not belong there and that a right to claim or use an equal part of the stream with other proprietors did not, then, exist as appurtenances to that particular land. It does, in fact, appear that, long anterior to the devise of the property and his acquisition of title, a wear or dam existed, turning the main body of the water from his side to the opposite side, where mills had been erected and which required all the power of the stream to carry them; and that the water thus turned has been used for those mills continually and exclusively for a period of forty years or more and during which time the dam had been constantly maintained without objection until it was swept away with the mills by the great freshet in the year one thousand eight hundred and forty-one. At least, such are the facts in relation to the dam and the manner of using the water as laid before me in the affidavit of John F. Hollman.

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This long and uninterrupted use is evidence of a right in the proprietors of the mills and mill sites on the south-easterly side to continue such use of the water there perpetually and for all time to come, unless it could be shown that such right, in its creation, related only to a temporary use or was to endure but for a limited time. The evidence of such a qualification must be produced by the party who claims that it was so: Woolrych's Law of Waters, 213; *Bealey v. Shaw*, 6 East's R. 208.

In *Wright v. Howard*, 1 Sim. & St. 190, the Vice-Chancellor of England stated the principle of the right to the use of the waters of rivers very clearly. The principle is as applicable here as it is in that country; and there can be no other in reason or justice any where. He observes that, "*prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but that there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of those proprietors who may be affected and no proprietor can either diminish the quantity of water which would, otherwise, descend to the proprietors below or throw the water back upon the lands off those above. Every proprietor who claims a right either to throw the water back above or to diminish the quantity which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietor affected by his operations or must prove an uninterrupted enjoyment of twenty years." This term of twenty years is now adopted upon the principle of general convenience as affording a conclusive presumption of a grant.

This principle of a right by prescription or presumed grant from an uninterrupted enjoyment of the use of the water for milling purposes on the side opposite to General Van Cortlandt's individual property for twenty years and upwards, in the absence of all proof to the contrary, is sufficient in law to preclude him from claiming an equal participation with other proprietors in the use of the water power of the Croton river at that place. But this adverse

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right does not rest merely on the presumption of a grant. There is evidence of an exprese grant or license to use the water for milling or manufacturing purposes on the south-easterly side, in exclusion of any right in General Van Cortlandt to use it for similar purposes on the opposite side : unless, indeed, as to a surplus, if any there should be. I allude to the evidence which the title papers furnish. In the first place, there is the lease, granted in the year one thousand seven hundred and ninety-two, by Pierre Van Cortlandt the elder and his son Philip to Underhill, of seventy acres of the river extending across and including some land on each side called a "Mill place." One object contemplated by this lease was the erection of a mill or mills which, at the expiration of the term of twenty-one years, should become the property of the lessors at a fair valuation. It is not specified on which side of the stream the mills should be placed, nor is the size or dimensions or quantity of power to carry them mentioned. All this was left to the option of the lessees without restriction ; but, whatever location should happen to be selected became, thereby, appropriated as the mill-seat, while, whatever description of mill they thought proper to erect, became, at once, entitled to the whole or to so much of the power of the stream as should be necessary to carry it and enable it to perform the work it was designed to do. Hence, also, the waters of the river to the extent that might be necessary became appropriated, likewise, to the act of the owners, in granting the lease to the purposes of the mill about to be built and, of course, to be drawn to that point where its use should be required. The mill having been located and built on the south-easterly side and the wear or dam having been constructed, as I infer, about the same time by which the water was turned to the mill, the right to use it there became a fixed and vested right by the act and consent of those who, at the time, had power so to fix it.

Nor is it to be regarded in the light of a temporary appropriation and use thus made of it which was to continue only during the existence of the lease to Underhill. It was evidently intended to be permanent, from the fact that the mill was not to be removed by the lessees, but was to be

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paid for and remain an improvement upon and a benefit to the Van Cortlandt estate. It has remained; and the artificial works have been constantly kept up and those who have succeeded to the ownership of the mill and its appurtenances are, in my opinion, as much entitled to claim the benefit of the original appropriation of the water power to that site as the mill itself. In the next place, there is the will of Pierre Van Cortlandt the elder, made in the month of December one thousand eight hundred and five—and which took effect upon his death in the year one thousand eight hundred and fourteen—making a still more decisive appropriation and grant of the south-easterly bank of the river and of the water to be used on that side for milling or manufacturing purposes. For instance, with the parcel marked B. on the diagram, is given, a “portion of water out of the Croton River Dam, should there be a mill hereafter on the lot mentioned.” The parcel C. is given as “all that mill-seat and lot of land whereon Robert Underhill built his mill, with a portion of water out of the Croton dam.” The parcel A. A. is devised to his son Philip as “all that mill seat and lot of ground whereon he has a mill on the south side of Croton river, with an equal proportion of water out of Croton River Dam.” And the small lot or parcel E. is granted by the deed of the sixth day of January one thousand eight hundred and thirteen as “a piece of land and mill place adjoining the river between the Underhill mill and the mill of his son Philip, with a right to part of the water out of the Croton dam and raceway in proportion to any of the mills,” &c.

These particulars are set out in the petition. Now, it is evident that the testator gave all these pieces of property as mill-seats and for purpose of mills. Indeed, two of them were already occupied by mills and the remaining two he supposed capable of being improved in the same way. He, therefore, gave, with each piece of property, a water power or right to take the water from the dam for the use of the mills then erected and for other mills if ever made. The gift of the water was to be as permanent as the gift of the land and was intended to confer a vested right in both. As to the two mills then standing, it was a present vested right

to the water. As to other mills on parcels B. and E., the right was prospective. These water rights for milling purposes became attached to the mill sites; and belong to them. The extent of the right, with respect to quantity of water, will be the subject of inquiry before the appraisers; and whether it embraced the whole power of the stream or something less than the whole will depend on the wants or requirements of the mills as they were originally constructed and were accustomed to be worked. If the mills required the whole, then, no part of the water power, as such, remains to be appraised to the owner of land on the opposite bank. The compensation must be given where the loss falls and in proportion as it falls upon one and upon another. There may be something due to General Van Cortlandt for a portion of the stream as it was accustomed to follow over the dam and along the north-westerly side while the mills were in operation and supposing them still to exist. If this surplus is so considerable as to be turned to any account as a water power for mechanical or manufacturing purposes—and this is a subject of inquiry and for evidence before the appraisers—it will be so estimated or, if useful for no other purpose than to benefit the farm or lands contiguous in an agricultural point of view and the owner is deprived, either wholly or partially, of the benefit in that respect, his damages ought to be awarded according to the value for such purposes. In short, the appraisers must endeavour to award to each owner and each set of owners a fair and just compensation for whatever of water power or use of water they are deprived of and to which they are legally entitled according to their respective ownerships in the lands contiguous, having a due regard to the purposes for which such water rights are held and are capable of being used.

In accordance with this great leading principle and with the views which I have endeavored to explain, I think the appraisers decided correctly when they determined to bear evidence in relation to the rights and interests of parties as owners and proprietors of the water power in order to ascertain whether, by prescription or by grant, it belonged exclusively to the proprietors of the lands and mill-seats on

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the south-easterly bank of the river and in what proportions and to whom the value thereof should be awarded.

This appears to me to be a necessary inquiry for the appraisers to make ; and they must be left to pursue it in the way they proposed, following, however, the track I have marked out for them, unless, however, they shall find occasion to deviate from it, in case evidence be produced proving a different state of facts in some particulars from what I have supposed to exist in relation to the rights of the parties, the situation of the property or the circumstances under which the water privileges have been held and enjoyed.

This opinion has been called for by the petition of the proprietors and not of the water commissioners ; and it is given rather as advisory than as directory to the appraisers in this stage of the proceeding. There seems to be no occasion for an order embodying these principles or provisions. A copy of my opinion can be laid before the appraisers ; and they will give to it such consideration as the facts which they may be able to ascertain shall appear to warrant. There is one part of the prayer of the petition about which, however, it is necessary to make an order. It prays that Mr. Smith, who was appointed as guardian *ad litem* of certain infants to look after their rights and interests in this proceeding without their knowledge or consent, may be discharged from that duty and that other persons, of their own selection, may be appointed in his place. This is but reasonable and proper ; and an order to that effect can, now, be entered upon this petition. It appears, however, since the decision establishing the title of Philip G. Van Wyck, as residuary devisee, that Master Pierre Van Wyck, one of the infants, has no title or interest in any one parcel of the property to which these proceedings relate, nor has his mother, Mrs. Alice Van Wyck, any interest therein ; and that it is now necessary to assign a guardian only for the two infants Walter Budd and Abraham V. W. Budd.

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DIXON
v.
ELY.

DIXON and another v. ELY.

A person who comes into this state for the express and sole purpose of giving testimony as a witness in an action at law, even where he has had no *subpoena* to testify served on him after arrival, cannot be taken on a writ of *ne exeat* while waiting to give evidence.

JUDGMENT-CREDITOR'S bill against the defendant David J. Ely; and when it was filed, he was a resident of the state of Ohio.

Oct. 8,
1844.

Ne exeat.
Witness.

On his coming into the state of New York, he was arrested on a writ of *ne exeat*; and a motion was now made to discharge it, mainly on the ground that he came within this jurisdiction as a witness. It will be sufficient to give an extract from his petition, on which the application was founded: "Your petitioner further shows that he arrived in the city of New York on the twenty-eighth day of September last past, for the purpose of attending the present circuit court now sitting in the said city of New York as a witness in a cause pending in the supreme court of judicature of the people of the state of New York, in which Silas Brown, Andrew A. Brown, Giles S. Ely and George L. Brown are plaintiffs and Zebulon S. Ely is defendant, on the part of the defendant. That your petitioner is informed that such cause is now on the calendar of the said circuit court and is expected to be tried on the fifth day of October instant. That the object of your petitioner in coming to said city of New York was to attend as such witness as aforesaid. That your petitioner came to New York expressly for that purpose; and that your petitioner would not at this time have come except that your petitioner was earnestly requested so to do by said Zebulon S. Ely and Elias H. Ely of the city of New York, the counsel of said Zebulon S. Ely; and that your petitioner had no other business to bring him to this city and has not purchased any goods on his own account in said city, but that he has purchased some goods to a trifling amount and executed other commissions for the

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accommodation of his friends who had ascertained that your petitioner was on his way to the city of New York and requested him to perform such services and that he has not received and does not expect to receive any compensation for such services.

"Your petitioner further states that he is not interested in any store or other business either at Masillon or elsewhere and that he has not in his possession or under his control any money which belongs to him; that all the money he has with him, which is of very small amount, belongs to the firm of J. & Z. S. Ely or L. S. Ely individually; and was handed to your petitioner to pay his travelling expenses as such witness."

It will be seen that the applicant came from another state to be a witness here. The fact also was, that he had had no subpoena to testify on his arrival within the jurisdiction.

Mr. *E. H. Ely*, in support of the application, relied upon the cases of *Norris v. Beach*, 2 J. R. 294; *Sanford v. Chase*, 3 Cow. Rep. 381 and *Cole v. McClellan*, 4 Hill's Rep. 60 and note there.

Mr. *J. McCahill*, for the complainant.

THE VICE-CHANCELLOR, under the circumstances detailed in his petition and the cases cited by his counsel, decided that he was entitled to his discharge:

Ordered: That the defendant be discharged from arrest on the *ne exeat respublica* issued in this cause; and that the bond taken by the sheriff of the city and county of New York thereon be given up to the defendant or his counsel to be cancelled.

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MILLS
v.
FOGAL

EAGLE FIRE INSURANCE COMPANY OF NEW YORK v.
FLANAGAN and others.

On exceptions to a master's report in relation to the rights of claimants upon surplus in a mortgage case, the same must be put on the calendar and cannot be disposed of by motion.

A CASE of foreclosure, where a sale had taken place and a surplus was brought into court. On a reference as to who was entitled to this surplus, exceptions were taken to the master's report; and now, being motion day, an attempt was made to bring on the argument of these exceptions.

Oct. 9,
1844.

Practice.
Mortgage.
Surplus
money.
Excep-
tions.
Motion.
Hearing,

THE VICE-CHANCELLOR decided that the cause would have to be put on the calendar and be regularly called and that the matter of the exceptions could not come on as a special motion on a motion day.

MILLS, Executor of Fogal, deceased v. FOGAL, et al.

The place of a testator's residence and death is the place for determining all questions that may arise respecting his personal property and its disposition and distribution, wheresoever it may be situated. But where a will has reference to real estate, all questions as to the will and the estate and its disposition are governed by the *lex rei sitæ*. And if a party dies intestate, leaving real estate, the descent and heirship are exclusively governed by the law where it is situated.

CAUSE heard on bill and answer. William Fogal lived, made his will and died at Bridgeport in the state of Connecticut. He left property there; and also real and personal estate in the city of New York. The will was proved by the complainant, as executor, before the surrogate of the city

Oct. 14,
1844.

Will.
Jurisdic-
tion:

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and county of New York. The testator left him surviving his widow, the defendant, Susan Fogal, and three young children—one of whom was born after the will had been proved.

The will was attested by two witnesses. It did not directly devise the real estate to the executors, but made them mere donees of a power to sell.

The complainant, as executor, filed his bill for the purpose of obtaining the direction of this court as to the true construction and effect of the will and as to the distribution which he was to make of the property under it.

The widow, by her answer, insisted that the laws of Connecticut only applied to the personal property of the testator; and that this will, according to such laws, should have been attested by three witnesses and was also void from the fact of the birth of an after-born child.

Mr. *W. K. Thorn*, for the complainant.

Mr. *J. W. Benedict*, for the infant defendants.

Mr. *Shannon*, for the defendant Susan Fogal.

Jan. 27,
1845.

THE VICE-CHANCELLOR :—The testator William Fogal being domiciled at Bridgeport in the State of Connecticut at the time of making his will and also at the period when he died, the laws of that state apply and govern all questions that may arise concerning this will so far as it is a will of personal estate and so far as personal property of the testator wheresoever situated may be affected by it. Moveable property is attached to and follows the person of the owner and its disposition by will; and its distribution or devolution in case of intestacy is governed exclusively by the law of his actual domicile at the time of his death, without regard to the place or *situs* of the property itself. This is the well established rule of the common law, both of England and this country: *Story's Conflict of Laws*, § 465, 468.

With respect to real estate, a different principle prevails. In case of intestacy, the descent and heirship of the real

estate is exclusively governed by the law of the state or country within which it is situated.

If there be a will, the capacity of the testator, the extent of his power to dispose of the property and the forms and solemnities to give the bill its due attestation and effect are to be determined by the *lex rei sitæ*: Story's Conflict of Laws, § 428, 435, 445, 448, 474, 483.

Now, from the facts stated in the bill and answer in this cause, it is very obvious that it was the duty of the executors, in the first instance, (unless they had chosen to renounce) to have gone with this will for probate before the proper officer or court in Connecticut and there asked for letters testamentary upon it as a will of personal estate. If they succeeded in getting it admitted to probate and in obtaining letters testamentary there, they should then and not till then have come to the surrogate of the city and county of New York for letters founded on the probate in Connecticut. If they had taken this course, there would have been no necessity for their asking the aid and direction of the court of chancery as the complainant now does. The surrogate or court of probates in Connecticut would have determined the question whether this is a good will of the personalty or whether the subsequest birth of a child unprovided for operates as a revocation. That question the widow has a right to have determined in Connecticut, where her husband lived and died; and if the executor will not produce the will there for probate, so as to give her an opportunity of meeting it she can apply for letters of administration here, so as to be authorized to look after and sue for and possess herself of the personal estate within this jurisdiction.

With regard to the real estate in New York: this will probably, is a good will to pass the title according to the laws of this state; and as such it may be proved and recorded, if that has not already been done. But the executors have no interest in the real estate and no concern with it, except as the mere donees of a naked power of sale—and that too upon condition that the widow shall concur and release her dower. There is no devise of the real estate to the executors in trust and no trust is created, except to invest the proceeds after a sale, &c. In relation to the real estate,

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its income or its proceeds, there does not seem to be the least occasion, at present, for asking the aid or direction of this court; and with regard to the personal property, as I have already shown, there is no propriety in the complainant's coming into this court.

His bill must be dismissed, with costs to be paid *de bonis propriis*.

WOOD, Assignee of Hunt v. OAKLEY, et al.(a)

Bill of foreclosure and notice of *lis pendens* filed forty days before decree while the statute of May 14th 1840 (dispensing with judgment-creditors as parties) was in force; but the decree was had after the act of May 7th 1844, (which annulled the § so dispensing with judgment-creditors as parties) was passed: *Held*, under the circumstances, that there was no necessity to make intervening judgment-creditors parties.

* *It seems*, that it might be different if forty days from the time of filing notice of *lis pendens* had not elapsed when the repealing law took effect. And in bills filed since the 6th of June 1844 (when this repealing act took effect) judgment-creditors are to be made parties.

Oct. 22,
1844.

Pleading.
Mortga-
gor and
Mortga-
gee.
Parties.
Judgment
Creditor.

MOTION to compel John P. Moore to complete his purchase made under a master's sale.

The bill was filed on the twenty sixth day of April one thousand eight hundred and forty-three, to foreclose a mortgage for twenty-three thousand dollars dated the seventh day of September one thousand eight hundred and thirty-eight, made by the defendant Charles Oakley to the North American Trust and Banking Company. On the twelfth day of August one thousand eight hundred and thirty-nine the said Charles Oakley conveyed the premises in fee to John B. Oakley, subject to the aforesaid mortgage; but intermediate the making of this mortgage and such conveyance to John B. Oakley judgments for a large amount had been recovered against the said Charles Oakley. And prior

(a) Affirmed on appeal to the Chancellor.

to the filing of the notice of *lis pendens* in this suit, judgments had also been recovered against John B. Oakley. The decree was had on the twenty-fifth day of June, one thousand eight hundred and forty-four.

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It is to be observed that intermediate the commencement of the suit and the obtaining the decree, the legislature passed the act of May seventh one thousand eight hundred and forty-four amending the law of May fourteenth one thousand eight hundred and forty, to reduce the expense of foreclosing mortgages, &c. by striking out the whole of § 9 of the last mentioned act; and which section provided that it should thereafter not be necessary to make judgment-creditors, subsequent to the mortgage foreclosed or any person having any lien or claim by or under such subsequent judgment, a party to the suit for the foreclosure thereof; and every decree of foreclosure and sale of lands mortgaged should bar and preclude all claim and equity of redemption of every person having such subsequent judgment and his heirs and personal representatives and of all persons claiming under him or them; but no such decree should be made, unless proof should be given that notice of the pendency of the suit had been filed at least forty days before the decree had been made.

The judgment creditors before referred to had not been made parties; and the present purchaser insisted that their rights were not cut off by the decree of sale. }

The sale had taken place on the twenty-first day of September last (1844.)

Mr. *Sandford*, on the master's report of sale and the conditions of sale, moved that the purchaser complete his purchase.

Mr. *Slosson*, for the purchaser.

THE VICE-CHANCELLOR :—The clause in the act of 1840, which dispensed with the necessity of making judgment creditors parties to foreclosure suits having been repealed by an amendment introduced into the act in relation to the foreclosure of mortgages, passed May seventh one thou-

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sand eight hundred and forty-four and which took effect on the sixth day of June following, restored the former necessity of making them parties. A law repealed must be considered (except as to transactions past and closed) as if it had never existed : Dwaris, 676. The bill of foreclosure in this cause was filed in the month of April one thousand eight hundred and forty-three ; the proper notice of *lis pendens* was filed ; and judgment creditors were not made parties. The decree was taken on the twenty-fifth day of June one thousand eight hundred and forty-four, nineteen days after the dispensing law had ceased to exist ; but the requisite proof was furnished of the filing of *lis pendens* in the form and manner prescribed by the statute at the time of filing the bill. By this means all the judgment creditors had notice, not only forty days before the decree, but much more than forty days before the law was repealed. The repeal has not taken away or altered their right to come in and claim the surplus, if any surplus there has been. Under these circumstances, I am of opinion the judgment creditors are as effectually foreclosed of all equity of redemption as they would have been had the decree been taken on or before the sixth of June. Perhaps it might be different if forty days, from the time of filing the notice of *lis pendens*, had not elapsed when the repealing law took effect. But here that time had elapsed ; and the effect of the repeal is not to undo and open what was closed and past under the previous law. It seems not a little strange that the legislature should have restored the necessity of making judgment creditors parties to foreclosure suits as formerly and, at the same time, have left in full force all that provision of the statute about the filing of a notice of *lis pendens* forty days before a decree can be had, which provision was introduced and intended as a substitute for the former practice. Still, the court must give effect to the law as it stands and both the presence of judgment creditors as parties and the forty days notice of *lis pendens* before decree are now necessary in cases of bills filed since the sixth day of June one thousand eight hundred and forty-four. In some instances of suits commenced previously thereto, I have advised an amendment so as to bring in judgment creditors, but this has been rather *ex abundanti*

cautela except where the proceeding had been but very recently and within the forty days commenced.

In the present instance, however, I am satisfied it is not necessary; and that the purchaser will obtain such a title under the decree as it stands. The court of chancery can always protect against the judgment creditors, if ever they should attempt to redeem or, in any way, disturb it.

Order: That the purchaser complete his purchase; and that each party bear his own costs of the motion.(a)

(a) His honor, the chancellor, in affirming the appeal, observed (*inter alia*): "It is not pretended by the purchaser that there is any doubt as to the validity of the mortgage upon which the foreclosure took place or that the equity of redemption is in fact worth anything to these subsequent judgment creditors. His whole objection to the title therefore proceeds upon the supposition that a court of equity might at some future time permit these creditors to redeem the premises upon payment of the whole amount due on the complainant's mortgage with interest thereon; although they had been allowed the privilege of becoming parties to the suit and of bidding upon the property to raise a surplus for their own benefit if they had thought proper to do so under the provisions of the statute as well as by the original act.

"As the statute now is, with the amendment of the ninth section, the complainant in a foreclosure suit is obliged to file a notice of the pendency and object of the suit at least forty days before he can obtain a decree. And judgment creditors, whose liens are subsequent to the mortgage and who are not made parties to the suit may apply to be parties or may claim a share of the surplus monies arising from a sale under the decree or may apply to set aside a sale under the decree in the same manner as if they were parties to the suit.

"It is very doubtful, therefore, whether this court would sustain a bill by a creditor having such a lien to redeem the mortgaged premises from a *bona fide* purchaser, who had given the full value of the premises at the master's sale, unless such creditor could show some equity beyond a mere nominal lien upon the equity of redemption at the time of such sale; even if the act of May one thousand eight hundred and forty had been passed as it is now left by this amendment of the original act. It is a settled principle of this court that a party who comes into this court for equity must himself be willing to do equity. And where a judgment creditor, who is not made a party, has no defence to interpose to the bill of foreclosure and is aware of the existence of the suit and of the decree of sale, so that he may attend the sale and see that it is fairly and properly made and that the premises are sold for their fair value to raise a surplus for his benefit, if they are indeed worth more than the amount of the complainant's debt and costs, it is hardly probable that this court would allow him the benefit of a subsequent rise in the value of the property or for buildings or improvements which the purchaser under the decree had subsequently erected or made.

"But whatever may be the construction and effect of this statute as to cases which have been commenced subsequent to the amendment in reference to the

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v.
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TURNER
v.
TURNER.

TURNER v. TURNER.

The fact of non-cohabitation, in a divorce case, is not sufficiently proved by a witness merely deposing that the parties (since separation) had not resided together "to the best of deponent's knowledge and belief." The persons with whom the wife has resided had better prove the fact.

Nor will a divorce be granted on the unsupported testimony of abandoned women.

Oct. 23,
1844.

Practice.
Adultery.
Divorce.
Husband
and wife.

BILL for divorce *a vinculo matrimonii*, filed by the wife against the husband. It had been taken as confessed; and, on reference, the master deemed the testimony sufficient to warrant a decree.

Two women gave evidence; both showing that they knew the parties in the suit; and each saying she had had connection with the defendant. In signing their depositions they used their mark. And the witness, who proved the marriage, added, in his affidavit, "They (the complainant and defendant) lived together as man and wife until about two or three years ago, when they separated and have not since resided together, to the best of deponent's knowledge and belief. Both complainant and defendant now reside in this city and have resided here for a number of years past."

Mr. J. R. Brady, for the complainant.

THE VICE-CHANCELLOR :—The testimony is insufficient as to non-cohabitation. Summers, the witness, testifies but negatively and not to his knowledge. The contrary may exist. He says, both parties reside in the city of New York. If this be so, why has not the complainant produced the per-

equity of redemption of judgment creditors not made parties but whose rights are still providdd for where they are actually aware of the pendency of the foreclosure suit, I am satisfied the judgment creditors in the present case have no right to redeem the premises from this sale to the complainant."

sons with whom she has resided since her alleged separation, in order to show how or in what manner she has lived? And if she be a chaste and virtuous woman herself, how does it happen that she is known to the two prostitutes who have been examined as witnesses. This part of the case requires explanation.

Besides—as to the fact of adultery: it rests solely on the testimony of two women whose characters, from their own showing, disentitle them to any credit. Such testimony may do when corroborated by facts or circumstances from other witnesses; but standing alone, as in this instance, a decree should not be made upon it.

The cause may go back to the master for further proof.

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MURRAY
v.
MECHANICS'
BANK.

MURRAY, EXECUTOR OF THE WILL OF RICHARD CUNNINGHAM v. THE PRESIDENT, DIRECTORS AND COMPANY OF THE MECHANICS' BANK IN THE CITY OF NEW YORK and others..

Where a will directed co-partnership debts to be paid in the following words: "I order and direct my said executor to pay and divide the same to and among the creditors of the late firm of C. & M'C. of the city of New York, curriers, to whom I, as one of the said firm, may be indebted at the time of my death rateably and proportionally, according to the amount of their several and respective claims and demands, so far forth as he shall be able conveniently to ascertain the same; and with a view to free this subject from all embarrassments, I will and direct that my executor shall cause an advertisement to be inserted for one month in two of the daily papers of the city of New York, notifying the said creditors of this order and direction and that such as come in at the end of the said month and produce their claims, duly authenticated, shall be entitled to their dividends and all others shall be excluded from any participation in the same. All debts of whatever grade to be placed on an equal footing."

Held, that this did not revive debts otherwise barred by time.

Where an answer expressly avers a new promise within six years and no replication is filed, the debt will be treated as revived.

Oct. 23.
1844.

Will.
Statute of
limitations.
Evidence.

BILL for direction to settle the construction of the will of Richard Cunningham. Gloriannah Cunningham, the first

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~
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BANK.

wife of the said Richard Cunningham, had made a will or appointment in the nature of a will under authority in certain deeds of settlement; and in such will or testamentary document she had directed her executors to invest all her estate; and expend and apply it (with some exceptions as to legacies) to the maintenance and support of her husband, the said Richard Cunningham. And with power to him to bequeath the principal by a will.

Richard Cunningham (after marrying again) made use of the power; and his will contained the following clauses: "And whereas the said Gloriannah Cunningham did further will and direct that, after the decease of the said Richard Cunningham, out of the monies to be put at interest or invested as aforesaid, certain legacies should be paid which are therein particularly specified; and after payment of the said legacies, all the rest, residue and remainder of her estate, real and personal in law and equity, she gave and bequeathed to such person or persons and uses and purposes as the said Richard Cunningham, in and by his last testament, should or might order, direct and appoint. Now, therefore, in order to carry into effect the intention of the said Gloriannah, I, the said Richard Cunningham, do hereby order and direct my executor hereinafter named to sell and dispose of all the said estate, real and personal, that may remain unsold at the time of my decease; and to make and execute proper conveyances for the same; and to collect and receive whatever sum of money may remain over and above the payment of the legacies mentioned and particularly enumerated in the will of the said Gloriannah Cunningham. And, after the payment of my funeral expenses and charges touching the proving and executing of this my will, then, as to all the rest, residue and remainder thereof, I give, devise and bequeath the same to my said executor hereinafter named, his executors, administrators and assigns: upon trust, nevertheless, to and for the uses and purposes hereinafter named, that is to say: in trust to put and place out the same at interest, on bond and mortgage, from time to time; and to pay over all the interest and dividends to arise and accrue

therefrom to my said wife Mary Ann during her natural life, if she shall so long remain my widow. And from and immediately after her death or second marriage, whichever event may first take place, then, as to all the said principal monies so to be invested as aforesaid, I order and direct my said executor to pay and divide the same to and among the creditors of the late firm of Cunningham & McCormick, of the city of New York, carriers, to whom I, as one of the said firm, may be indebted at the time of my death, rateably and proportionally, according to the amount of their several and respective claims and demands so far forth as he shall be able conveniently to ascertain the same. And with a view to free this subject from all embarrassments, I will and direct that my executor shall cause an advertisement to be inserted for one month, in two of the daily papers of the city of New York, notifying the said creditors of this order and direction and that such as come in at the end of the said month and produce their claim, duly authenticated, shall be entitled to their dividends; and all others shall be excluded from any participation in the same. All debts of whatever grade to be placed on an equal footing. Lastly. I do hereby nominate and appoint my esteemed friend, the said John R. Murray, sole executor of this my last will and testament."

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BANK.

The bill in this case, after setting forth the wills of Gloriannah and Richard Cunningham, contained the following clauses:

And your orator further shows unto your honor that, on or about the eighteenth day of September one thousand eight hundred and thirty-seven and subsequently to the execution of the will last above recited, the said Mary Ann, the wife of the said Richard Cunningham, departed this life, leaving her surviving her husband the said Richard Cunningham. And that, subsequently to the making of the said will of the said Gloriannah Cunningham, he, the said Richard, received a bequest under the will of a certain J. F. Marsh of Westchester County; and from that and other sources he left about the sum of thirty-eight hundred dollars which is not disposed of by his said will. And your orator farther shows unto your honor that, on or about

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the third day of June one thousand eight hundred and thirty-eight the said Richard Cunningham departed this life, not having altered, revoked or cancelled his said will. And your orator farther shows unto your honor that the said will of Richard Cunningham was duly proved before the surrogate of the City and County of New York; and letters testamentary thereof granted to your orator on or about the twenty-eighth day of May one thousand eight hundred and thirty-nine; and that he has taken upon himself the burden of the execution thereof. And your orator farther shows unto your honor that he has advertised for the time and in the manner required by law; and, also, for the month, daily, as directed by the will of the said Richard Cunningham; and that several creditors of Cunningham & McCormick, that is to say, the president, directors and company of the Mechanics' Bank in the city of New York a corporation located and doing business in the city of New York, Phila Cunningham of Heightstown, New Jersey, David S. Brown, survivor of D. S. & J. Brown, of the city of New York and Hiram Ketchum and Thomas Fessenden of the city of New York have presented claims of long standing and of divers amounts, which are all barred by the statute of limitations, except a judgment held by the said Mechanics' Bank in the city of New York which was obtained on the eighth day of August one thousand eight hundred and twenty-three. And your orator farther shows unto your honor, that he is informed and believes and, therefore, states that Pierre Lawrence of Newark, New Jersey, Margaret A. Lawrence of the city of New York and Catharine Tickenor, wife of Daniel A. Tickenor of the city of New York are the next of kin of the said Gloriannah Cunningham, deceased; and that they now contend and claim that they are entitled to have and receive the portion of the estate of the said Gloriannah Cunningham which is unexpended and that the debts of Cunningham & McCormick are all outlawed with the exception of the said judgment and should not be paid; and that if the said judgment is to be paid at all, it should be paid out of the property acquired by the said Richard Cunningham subsequently to the death of the said Gloriannah Cunningham. And your

orator farther shows unto your honor that Hugh McCormick, the former partner of the said Richard Cunningham, died long previous to the decease of the said Richard. And your orator farther shows, on information and belief, that the said David S. Brown, having become insolvent, made a general assignment for the benefit of his creditors of all his estate, debts and effects to one Moses Ward of the city of Newark, New Jersey; and that the said Moses Ward, by virtue of the said assignment, is now the owner of the said claim of the said D. S. & J. Brown against the said Cunningham & McCormick. And your orator further shows unto your honor that he has now in his hands and unexpended the principal sum of about thirty-eight hundred dollars—proceeds of the estate of the said Richard Cunningham; and the farther sum of about forty-seven hundred dollars of principal, proceeds of the estate of the said Gloriannah Cunningham. And your orator farther shows unto your honor, as he is advised by counsel and verily believes, that he cannot, as the executor of the said will of the said Richard Cunningham, carry into effect the said will according to all the various provisions thereof with safety to himself without the previous advice, sanction and protection of this court and a judicial exposition of some of the provisions thereof; and, among other questions arising under the said will, he does respectfully submit to the decision of this court: whether he will be legally justified as executor of said will in paying simple contract debts of Cunningham & McCormick which are barred by the statute of limitations?—and if it shall be adjudged that such debts are good and valid claims upon him as such executor, then, your orator needs the farther advice and direction of this court as to whether he should or should not, in paying such debts, be confined to that portion of the estate of the said Richard Cunningham which was devised from the said Gloriannah Cunningham?—and if it shall be adjudged that such outlawed claims are not to be paid out of said estate, then, whether that portion of the said estate derived from said Gloriannah should or should not be applied in the first instance to the payment of the amount due upon the claim of the aforesaid judgment creditor, which claim would near-

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ly absorb the whole of such portion of said estate?—and if the simple contract debts are excluded and that portion of the estate derived from said Gloriannah shall be more than sufficient to pay such judgment creditor, then, whether the residue thereof should go to the representatives of the said Gloriannah or of the said Richard Cunningham?—and if the simple contract debts are excluded and the judgment creditors claim be directed to be paid out of property acquired by the said Richard Cunningham after the decease of the said Gloriannah Cunningham, if the same should be sufficient for that purpose, then, whether the whole of the estate derived from the said Gloriannah Cunningham which may then remain should go to the representatives of the said Gloriannah or of the said Richard Cunningham? &c. &c.”

It is deemed unnecessary to refer to the answers interposed.

Mr. *Horace Holden*, for the complainant.

Mr. *Thayer*, for the next of kin of Mrs. Cunningham.

Mr. *Fessenden*, for the defendants Ketchum and Fessenden.

Mr. *Titus*, for the Mechanics' Bank.

October 6, 1845. † THE VICE-CHANCELLOR :—This case is somewhat peculiar. The will of Richard Cunningham is in the nature of an appointment under the will of his wife Gloriannah, by which he, in effect, appropriates the property left to him by that will to the payment of the debts of his late co-partnership of Cunningham & McCormick. Thus selecting a class of creditors for whose benefit he creates a trust. And it is such a trust as is authorized by the revised statutes. Still, it is a question whether the trust to pay the debts of the partnership includes debts barred by the statute of limitations at the time of this testator's death?

The expression of the will strongly indicates the intention not to make such a distinction or discrimination. He says: “to pay and divide the same among the creditors of

the late firm to whom I, as one of the late firm, may be indebted at the time of my death rateably, &c. so far as the executor shall be able conveniently to ascertain the same;" and to enable him to do that he directs the executor to advertise one month in two newspapers for creditors to produce their claims, &c. And such as do so shall be entitled to their dividends, whilst all others shall be excluded and all debts of whatever grade to be placed on an equal footing. But even since the case of *Burke v. Jones*, 2 V. & B. 275, it has been an established rule that a devise of real estate in trust to pay debts which the personal property might be insufficient to discharge, did not revive debts upon which the statute had taken effect at the death of the testator. Lord Brougham, it is true, went against it in *Jones v. Scott*, 1 Russ. and M. 255; but his judgment was reversed in the house of lords: 4 Clark and Finn. 482; and the rule in *Burke v. Jones* was restored and has since been followed by Lord Cottenham in *Freaker v. Cranefeldt*, 3 Mylne and Cr. 499; and by the master of the rolls in *Evans v. Tweedy*, 1 Beavan, 55, where the argument founded on the idea of there being a trust was not allowed to prevail. These cases are decisive of the present on that point.

The next question is, whether the statute had, in fact, run against the demands presented to the executor in consequence of his advertisement?

The debts due to the Mechanics' Bank and to Hegeman (in judgment) were not affected by the statute of limitations, being debts of record. Nor is the debt to Brown, now represented by Ward, affected by the running of the statute, since this answer expressly avers a promise to pay within six years and the answer is uncontradicted—not having been replied to. So, with regard to the demand of Messrs. Ketchum and Fessenden, to the amount of one hundred and nineteen dollars, being a balance due them for costs of a suit pending at the time of the testator's death, that is not affected by the statute; but the rest of their claim, fifty-two dollars and seventy cents, is confessedly outlawed. And such is also the case with respect to the note held by Phila Cunningham. Nothing is shown by her answer to take it out of the statute, except the expression in the will—and

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that, we have seen, is not sufficient for the purpose. Her demand, therefore, and the claim of Ketchum and Fessenden, to the amount of fifty-two dollars and seventy cents, are to be excluded from any dividend of the fund in the hands of the executor. I suppose it is a matter of no moment to marshal the assets in this case, since the debts to be paid, according to my views, will absorb the whole of both funds held by the executor, yet, I am of opinion and the decree may so direct that the four thousand seven hundred dollars—proceeds of Gloriannah's estate—is, by the will of Richard, constituted the primary fund for the payment of the debts of the firm of Cunningham & McCormick and must be divided accordingly, considering those debts placed upon an equal footing by the will and to be paid rateably.

The costs of all parties are to be paid, in the first instance, out of the four thousand seven hundred dollars; and, then, the residue must be divided between the two judgment creditors and the two simple contract creditors Ward and Messrs. Ketchum and Fessenden. The other fund, of three thousand eight hundred dollars, not being appropriated by the will, is to be applied in due course of administration. In the absence of individual debts of the testator Richard Cunningham, this money is to be applied to the balance that will remain due on the two judgments rateably as preferred debts and if more than sufficient to satisfy them, then, to go towards the balance due on the two simple contract debts before mentioned.

Decree accordingly.

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THE FARMERS' LOAN AND TRUST COMPANY v. THOMAS CLOWES and wife.

The statute incorporating the Farmers' Loan and Trust Co. (which allowed loans on bond and mortgage) declared that the act should expire at the end of fifteen years, except as to insurance on lives and the granting of annuities. By an act passed shortly before such expiration, a new name was given to the company and its existence (without fresh powers) was thereby continued. After this last act went into effect and after the expiration of the fifteen years, the company advanced on bond and mortgage. And the court *Held* that, as the power to make insurances on lives and the granting of annuities was saved, the company must have funds to apply to them and might invest in order to carry on such business; and, therefore, they were justified in such advance and the same would be presumed to have been done in the ordinary course of its business.

BILL of foreclosure by the Farmers' Loan and Trust Company, a corporation located and doing business in the city, county and state of New York, of a mortgage by the defendants Thomas Clowes and wife of Troy, dated the nineteenth day of August one thousand eight hundred and thirty-seven, on premises in the town of Brunswick, county of Rensselaer, for securing \$3000 in one year, with interest.

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The Farmers' Fire Insurance and Loan Company was incorporated on the twenty-eighth day of February one thousand eight hundred and twenty-two, with power to make loans on bond and mortgage. By the 20th § of the act, such act was to expire at the end of fifteen years from the time of its passage, except as to insurances on lives and the granting of annuities, provided that all contracts previously made should be binding and obligatory. And by an act passed on the seventeenth day of April in the same year (1822) the company had power to take property in trust. On the thirtieth of April one thousand eight hundred and thirty-six, an act was passed to alter its name to its present style of *The Farmers' Loan and Trust Company*, although no power is therein given to continue the granting any "Loan." Its 6th § runs thus: "Nothing contained in this act shall be construed to confer upon this corporation any

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"powers other than those conferred upon them by the original act amending the same, passed April 17 1822, except in relation to the change of its name and election and classification of directors." It will be seen that the original charter would expire on the twenty-second of February one thousand eight hundred and thirty-seven and that the bond and mortgage of Clowes and wife were given on the nineteenth day of August thereafter.

Plea interposed, for that all the corporate powers of the said complainants had ceased and expired from and after the twenty-eighth day of February one thousand eight hundred and thirty-seven "except as to insurances upon lives and of the granting of annuities" and except as to contracts previously made." And the said Thomas from his own knowledge and the said Nancy from information which she believes to be true, aver that the bond and mortgage mentioned in the bill was not executed in pursuance of any contract made previous to the expiration of such corporate powers nor in pursuance of any contract made for any insurance of life or lives or granting any annuity or annuities. But that the said bond and mortgage were given and executed by the defendants under an agreement made between the complainants and the defendant Thomas Clowes for a loan to be made by the complainants to the said defendant Thomas Clowes on the security of the said bond and mortgage at or about the time the said bond and mortgage bears date and after the said twenty-eighth day of February one thousand eight hundred and thirty-seven. And the defendants insist that, at the time of the making of the said agreement and at the time of the execution and delivery of the said bond and mortgage the complainants were not authorized by law to loan money to accept and receive the said bond and mortgage as a valid security or to make any loans on the security of bond and mortgage. And the defendants also insist that ever since the said twenty-eighth day of February one thousand eight hundred and twenty-seven the complainants have not been legally invested with or entitled to any corporate powers, rights or franchises whatsoever, "except as to insurances upon lives and of the granting of annuities" and except as to contracts made before that time. All which, &c."

Mr. *Clowes* in *pro per.* and in support of the plea argued, that the power of the company had expired, so far as the loaning of money was concerned and in every other respect not saved by the § 20 of its original charter; and he cited and commented on Laws of 1822 p. 47; Ib. 254; Laws of 1836 p. 281; 2 Cowen's R. 699, 710; 3 Wen. R. 485, 583; 7 Wen. 31; 5 Conn. 569, 574.

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Mr. *E. H. Ely* and Mr. *Wm. Curtis Noyes*, contra, contended, 1. That the right to loan was incident to the powers expressly reserved by the § 20; and also, that the express power to loan was reserved: Kidd on Cor. 108; Co. Lit. 264; Ld. Raymond 439; 1 Johns. Ch. R. 508, 527.

2. That the defendant was estopped by the bond and mortgage from denying that the corporation existed: 14 Johns. R. 245; 8 Wen. 483.

THE VICE-CHANCELLOR :—It might be a serious question under the § 20 of the company's charter, whether all its powers did not expire within fifteen years except as to insurance upon lives and granting annuities and also whether the act of the 17th April 1822 was not, also, within the limitation of the § 20 of the original charter; but it is not necessary, now, to decide these points, inasmuch as, in reference to the powers expressly reserved to be exercised by the company under the § 20, the company must have funds which they may properly apply to pay annuities and claims due from them upon life policies and these they must, from time to time, invest in order to carry on the business. They had a clear right, therefore, to make a loan on bond and mortgage of these funds; and the presumption is that the loan was in the ordinary course of the business of the company.

There is also another view, which in my opinion is conclusive. The act of April 30 1836 is only reconcilable with the idea that the legislature intended to make the existence of the company perpetual or rather to permit it to exist during its pleasure. It was passed only a year before the expiration of the fifteen years limited by the § 20 of the original charter. A new name was given to it and limitations and restrictions were imposed upon it, all of which would

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have been idle, if its charter was to expire within the time now contended for, a period of about ten months.

The existence of the company, therefore, so long as the legislature should see fit not to repeal its charter, was clearly intended and its power to make loans was equally clear.

The plea is, therefore, overruled, with costs, with liberty to the defendant to answer.(a)

(a) The defendants answered; and, on proofs being taken, a decree passed for the plaintiffs before the vice-chancellor; and which decree was subsequently affirmed, on appeal, by the supreme court in the third judicial district and by the court of appeals at the June term 1850. The following are the facts and argument before the latter court and its opinion.

*Facts.*—On or about the 19th August, 1837, the appellant, Thomas Clowes, applied to the respondents for a loan of money and, on the 23d day of September thereafter, he borrowed of them \$3,000 and gave his bond and mortgage for its repayment, dated the first mentioned day, conditioned to pay that sum within one year from date, with interest at seven per cent. per annum, payable yearly, as the same should accrue on the first day of November in each year.

The money thus loaned to the appellant was received by him in two checks for \$1500 each, drawn by the respondents on the Bank of America, each dated the 23d of September 1837, payable to the order of the appellant, which were drawn by him, he having first endorsed them.

It appeared that the application for the loan was made by Judge Cushman, to whom the respondents had previously agreed to loan \$28,000 upon his furnishing good security by bonds and mortgages, who probably received the checks and that he transferred to the appellant sixty shares of Phenix Bank stock on the day the checks were dated.

This stock was nominally worth \$100 per share, and was at that time selling much above par. It was transferred by Judge Cushman to the appellant at 24 per cent. advance.

The respondents had previously held a much larger amount of Phenix Bank stock as a security for a debt due from Judge Cushman and transferred to him 60 shares on the day he transferred them to the appellant.

It was proved that the respondents knew nothing of the transactions between Judge Cushman and the appellant and had no interest in them or in the stock and that the terms of sale of the stock were those of Judge Cushman alone and the benefit of the sale exclusively his.

The cause was heard on pleadings and proofs before vice-chancellor McCoun, who made a decree for the respondents, which being appealed from, was affirmed by the supreme court before justices Harris, Watson and Parker in the third circuit.

*N. Hill, Jr.*, for the appellant, argued the following points:—

I. The complainants had no express legal authority to take said bond and mortgage, because their charter had expired at the time of the loan.

The 20 § of their charter, passed 22d February 1822, says this act shall

expire at the end of fifteen years from the time of its passage, except as to insurance upon lives and of the granting of annuities, provided that all contracts previously made shall be binding and obligatory.

Bond and mortgage dated August, 1837.

By an act passed same session, 17th April, complainants were further authorized to receive property on trust.

The evidence of Delafield and Fitch prove, as far as a negative can be proved, that the loan was not made either under the trust act or under the exceptions in the limitation clause.

If it had been, the complainants could have shown the affirmative and under such evidence were bound to do so.

They had neglected to make the annual statements required by law and this warrants a presumption against them. The act of April 30th, 1836, was doubtless intended by complainants as a renewal of their charter indefinitely and therefore perpetually. But it fails of its purpose because the complainants might have a legal existence beyond the fifteen years, whether the exceptions in the limitation clause contemplated the making new policies or only provided for existing ones, which must necessarily be uncertain in their duration and this last view receives confirmation from this clause, "provided that all contracts previously made shall be binding and obligatory."

The 18th section of the act provides that in respect of all debts which shall be contracted by the said corporation before the time limited for the expiration of this act, the persons composing the said corporation at the time of its dissolution shall be responsible in their individual and private capacities to the extent of their respective shares in the funds of the said corporation at the time and no further, in any suit or action to be brought and prosecuted after the dissolution of the said corporation.

II. The complainants had no implied power to loan money, because that power had been expressly given and expressly taken away by limitation: no implication can arise against the express words of a statute: 5 Hill, 226.

Even under more favorable circumstances, where there was nothing to negative the implication, the courts have held that the power to insure, &c., does not imply the power to loan money: *N. Y. Fireman's Insurance Co. v. Ely*, 5 Connecticut Rep. 567, 569, 574; *Fireman's Insurance Co. v. Ely*, 2 Cowen, 699; Sutherland, J. 709-10, Ch. J. Savage; *North River Insurance Co. v. Lawrence*, 3 Wend. 485; *Beach v. Fulton Bank*, same 583; *Life and Fire Insurance Co. v. Mechanics' Insurance Co.*, 7 Wend. 34; 5 Hill's R. 226; 2 Cranch 166.

This loan was not made by complainants out of surplus cash. They loaned it in September, because in the April before they had agreed with Cushman to do so. They had not cash to loan. They virtually exchanged Phenix Bank stock for mortgages and enabled J. P. C. to obtain from each of the mortgagors a bonus, which indemnified him for relinquishing the other arrangement.

The complainants were bound to have shown that they had surplus funds and the necessity of its investment.

They acted on the claim of a perpetual charter. In April, 1837, they held the security and were engaged to loan bonds to J. P. C. and others for \$200,000. The idea of an implied power is an after thought, as was said in

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a recent case, nothing but the recklessness of the complainants could have raised a doubt in their favor.

The trust power was distinct from the other business of the corporation and it was required by the law that the accounts should be kept separate. The usurpation of power by the corporation, if tolerated by the courts, by which bad precedents are established, will insensibly transfer the power of legislation to corporation directors and the more reckless they become the more ruinous the effect, if not sustained by the court.

The legislature creates a corporation with large capital and extensive powers. Before they rise they add largely to its business. Everything necessary is amply and legally provided for.

But still they limit its duration to fifteen years. And here is the forbidden fruit. And legal subtlety is invoked to make mortality immortal and the abortive act of 1836 is the result.

III. Bond and mortgage not conformable to the charter is therefore void.

3d section provides "that any such loans on bond and mortgage or other securities on real estate shall not be made payable in a shorter time than one year and the interest payable annually.

"The condition of the bond and mortgage is for the payment of the sum of \$3,000 in one year from the date thereof, with interest thereon, at and after the rate of seven per cent. per annum, to be paid yearly as the same shall accrue on the first day of November in each and every year, until the said principal sum was fully paid."

1. Bond and mortgage dated August 1837, the accruing interest to the 1st November 1837 was paid on that day. The receipt of the interest was a practical construction of the deed.

The plain meaning is that whatever interest at the rate of 7 per cent. per annum should accrue on the 1st November in each and every year should on that day be paid. The 1st November occurs yearly and therefore the payment is yearly: though it may not be a whole year's interest. A child born on Christmas eve and lives a year and a day will have seen two yearly Christmas festivals. In the statute the plain meaning is a full year's duration. In the bond and mortgage the annual occurrence of the pay day, the 1st November.

IV. Bond and mortgage void for usury.

That the defendants paid usurious interest is not questioned; but it is denied that the complainants had any interest in the transactions of J. P. Cushman or were in any wise responsible for his acts. He made the arrangement by which the defendants with others were bound to receive and did receive, in lieu of cash, Phenix Bank stock at a rate much beyond its market value. During the months of August and September this stock, which was taken at 124, ranged from 106 to 11.

Taking the medium at 108, made the bonus paid Cushman by defendants \$940. This loan was the result of an arrangement between complainants and Cushman, made in April or May 1837. They would not at that time have made loans in cash.

Cushman was largely indebted to complainants, secured by Phenix Bank stock. This identical stock was transferred by complainants to Cushman and by him to defendants and the other borrowers; so that the complainants

did not in fact make the loans in cash ; but substituted mortgages for Phenix Bank stock.

Now, if the complainants conceived themselves benefited by this change of securities or if they felt themselves bound to indemnify Cushman for his expenses and trouble and furnishing the loan of \$200,000 in bonds, they were responsible for his acts. If they chose for any reason to vest in him the power of making loans for them, they are responsible. That the power was in Cushman is certain ; for why should all those borrowers pay such a bonus if the loans could be obtained without his intervention. They were all competent to negotiate their own business. As the authorized agent of complainant he made the bargain with the borrowers. The complainants ratified that bargain by aiding in carrying it out. It is no answer to say that complainants received no part of the bonus. If the cashier of a bank should receive a private douceur for discounting a note on which the bank received only legal interest, would it not be usury ?

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*Wm. Curtis Noyes*, for the respondents, argued the following points :—

The decrees appealed from should be affirmed, because—

I. The appellant is not at liberty to deny the existence of the respondents as a corporation under the laws of this state, having omitted to present any such defence in his answer. 2 R. S. 458, § 3.

But if he is, its existence is fully established by the several acts in relation to this corporation : *Laws 1822*, p. 47, § 3 ; *Ib.* p. 254 ; *Laws of 1826*, p. 261 ; *Far. Loan and Trust Co. v. Perry*, 3 Sandf. Ch. R. 339.

II. The taking of the bond and mortgage is presumed to have been lawful and in the ordinary course of the authorized business of the company : *N. Y. Fireman's Ins. Co. v. Ely & Sturges*, 2 Cowen's R. 664 ; *Far. Loan and Trust Co. v. Perry*, 3 Sandf. Ch. R. 339.

III. The restriction in the third section of the original act incorporating the respondents does not extend to its trust powers, which were conferred by a subsequent act, but if it did, it would not render a bond and mortgage void, the interest of which was payable in a shorter period than that limited by that section ; its effect would be simply to extend the time of payment according to its terms ; *Laws 1822*, p. 47, § 3 ; *Ib.* p. 254 ; *Edwards v. Far. Loan and Trust Co.*, 21 Wend. R., 467 ; 26 *Ib.* 541 S. C.

IV. The bond and mortgage were payable annually, according to the provisions of the third section already referred to : 2 Sandf. Ch. R. 339, *supra*.

V. The answer does not set up any usurious agreements between the appellants and the respondents nor any between the company through Judge Cushman as its agent and the respondents, nor does it allege any that were covertly usurious.

1. Instead of making any such allegations, it states that the agreement actually made with the respondents by Judge Cushman was to loan him \$200,000 at seven per cent. interest.

2. The answer does not state that the respondents were parties to the arrangements alleged to have been made between Judge Cushman and the appellants, nor that he was their agent or acted as such, nor that they knew anything about it, adopted or ratified it in any way.

VI. The proofs do not make out a case of usury, even if the answer is suf-



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ficient. To sustain such a defence it should have been shown that Judge Cushman was the agent of the respondents and actually made a usurious agreement for them but this was not done.

1. No express or implied appointment, as agent, was shown.
2. There is no ground for presuming he was agent, either as matter of law or fact.
3. He was not a director or stockholder of the company and had never been employed to transact any business for them.
4. Nor could he be considered as their agent on the ground of a subsequent adoption or recognition of his acts. The respondents had no knowledge of his transactions with the appellants and of course could not ratify what they did not know.

5. On the contrary, it is quite clear that he acted as the agent of the appellants.

(a) He applied to the respondents for the loan, as the answer admits and as he testifies.

(b) He delivered the bond and mortgage to the respondents.

(c) The appellant, T. Clowes, received the checks for the sum loaned, \$3000, being the exact amount of the bond and mortgage and drew the money upon them through Judge Cushman upon his own endorsement, thus treating the transaction as his own.

6. Judge Cushman testifies that the agreement made by the respondents was to loan \$28,000 at seven per cent. and of this sum the appellants were to receive and actually received the \$3000, at that rate of interest, which was clearly not usurious.

7. Mr. Delafield testifies in substance to the same facts.

8. The only agreement ever made between the appellants and the respondents is that of which the bond and mortgage form the evidence and there can be no pretence that they are usurious. The respondents having loaned the full sum of \$3000 and having reserved only seven per cent. upon it and having had no interest in the stock or the profit made upon it, if any, cannot by any possibility have reserved or taken or agreed to reserve or take, more than the lawful rate of interest.

N. Hill, in reply, insisted that the taking of the bond and mortgage, by the respondents, was an adoption and ratification of the acts of Judge Cushman in regard to the stock transaction and that, as they would have been void for usury in his hands, they were entirely void and could not be enforced by any one. He cited *Farmer's Loan and Trust Co. v. Walworth*, 1 Comstock 433-4; 5 Denio, 567; Broom's Maxims, 425.

HURLETT, J., delivered the opinion of the court:—

The bill in this case was filed for the foreclosure of a mortgage given by the defendants to the plaintiffs, bearing date the 19th day of August 1837, to secure the payment of \$3000 in one year from date with interest at the rate of seven per cent. payable yearly, as the same should accrue, on the first day of November in each year until the principal, which had been loaned by the plaintiffs to Mr. Clowes, should be paid.

The defendants rely upon the following grounds of defence.

1st. That the charter of the company had expired at the time of the loan;

2d. That, if in existence, the company had no authority to make a loan; 3d. That the bond and mortgage were not conformable to their charter and therefore void; and 4th,

That they were void for usury.

The plaintiffs were incorporated by an act of the legislature passed on the 29th of February 1822, under the name of "The Farmers' Fire Insurance and Loan Company" with power to make loans on the security of bonds and mortgages and certain stocks mentioned in the act and to receive such conveyances of real and personal property as might be necessary to enable them to obtain payment and satisfaction of such loans.

They were also authorized to insure all kinds of property against loss or damages by fire, to insure upon lives and to grant annuities.

Their capital was fixed at \$500,000, with power to increase it to a million; and the charter was limited so as to expire at the end of fifteen years, except as to insurance upon lives and the granting of annuities.

By a subsequent act passed on the 17th of April 1822, the company was authorized to take by deed or devise any effects or property which might be left or conveyed to them in trust and to assume and execute any trust which might be created by deed or devise in the same manner and to the same extent as any trustee. This statute allowed of an increase of their capital to one million of dollars more than was authorized by the original act, but contained no limitation as to the duration of the powers conferred upon it. A statute of April 30, 1836, changed the name and style of this corporation to that of "The Farmers' Loan and Trust Company" except as to this change and the classifications of directors the provisions of this act were of a restrictive character. It limited the amount of property which the company might at any time hold in trust to five millions of dollars and declared that nothing contained in it should be construed to confer on the corporation any powers other than those conferred by the original act of incorporation and the act amending it, except in relation to the change of its name and the election and classification of directors. This act also was silent as to the duration of the charter. These statutes taken together leave no room to doubt that the charter of the company was in existence at the time of the loan which is the subject of this controversy. Their corporate capacity remained, with power to insure upon lives, to grant annuities and to assume and execute trusts. These powers were conferred without any limitation in respect to the time of their duration, and must exist until they are repealed by an act of the legislature.

In respect to them the charter is perpetual. But the defendants still insist that the company had no express power to loan money, that having expired by limitation at the end of fifteen years and that such a power cannot be raised by implication after an express withdrawal of it by legislative design.

Although the act of April 1836 designates this corporation as a loan company, it did not confer any powers which could warrant that title and all it did in this respect was to create a *misnomer*. So that the authority of the company to make loans of money can only be upheld as an incident to the other powers conferred by their charter. It has been seen that by the original act of incorporation this power was not only expressly conferred, but was put forth as the leading one with which the legislature saw fit to clothe the company. They were authorized to increase their capital to a million of

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dollars, mainly, as it would seem, for the purpose of accommodating borrowers and care was taken that they should loan a large share of their capital to persons residing without the limits of the city of New York. This power ceased at the expiration of the period mentioned, after which the company no longer existed for the express purpose of loaning money, but nevertheless remained a corporation for other declared purposes, with precisely the same rights and powers as though those purposes had alone been the object of their original creation. They were not forbidden to loan money after the expiration of fifteen years, but they were not thereafter expressly authorized to do so.

They were no longer a loan company, but were now a life insurance and trust company with power to grant annuities and having a right to employ all their original capital in the business to which they had become restricted and to hold the property in trust to the amount of five millions of dollars. It could hardly have been contemplated by the legislature that their capital should remain unproductive in their vaults and especially not that the funds held by them in trust should remain uninvested. It was their very business to see that they were safely and properly invested as well for the security of the beneficiaries as for their own protection. In no other way could they preserve their existence and solvency or execute trusts in the manner of other trustees. The case differs from the *N. Y. Fireman's Insurance Company v. Ely & Parsons*, 5 Conn. R. 560; 2 Cow. R. 278, where the charter provided amply for investing the funds of the corporation and pointed out the manner in which it should be done, while it expressly denied banking powers and the court held that the discount of a note by a fire insurance company under such a charter was unauthorized and void.

I think the true view of the powers of the plaintiffs under their charter was taken by the learned assistant vice-chancellor in the case of *The Farmers' Loan and Trust Company v. Perry and others*, 3 Sandf. Ch. R. 339, where their authority to make loans upon bond and mortgage was sustained as a proper and necessary means of enabling them to effect the purposes for which they were incorporated and especially to fulfil their duties and obligations in respect to the trust powers conferred by their charter. Assuming then that the plaintiffs were authorized for that purpose to make loans, it rested upon the defendants to show expressly that the loan in question was not made in the proper management or investment of the funds entrusted with the company, as in the absence of proof to the contrary it will be intended, that the company were pursuing their lawful business when they advanced the money to the defendants upon the securities in suit. The evidence adduced by them on this subject does not establish, with any certainty, from what fund the loan proceeded and I think the defence, upon this ground, must be deemed to have failed.

The next objection is, that the bond and mortgage were not taken according to the charter, the 3d section of which provides "that any such loans on bond and mortgage or other securities on real estate shall not be made payable in a shorter time than one year and the interest payable annually." This section appears to have related to the securities to be taken on the loans which the company were expressly authorized to make during the first fifteen years of their existence and I am inclined to think became inoperative when the express power of the company to make loans ceased. But if not, I am

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HAXTUN  
v.  
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HAXTUN and others v. CORSE and others.

A judgment creditor, who proves his debt in bankruptcy in order to oppose the bankrupt's discharge and not with a view to a dividend and succeeds in his opposition, cannot afterwards pursue the bankrupt and his property through a creditor's bill. All the property becomes vested, on the first application of the bankrupt, in the provisional assignee and the proof of debt is an election to come in and the judgment is thereby surrendered—and dividends only can be received.

On the third day of February one thousand eight hundred and forty-two, the defendant, Barney Corse, presented to the district court of the United States for the southern district of New York, his petition, in due form, for the benefit of the bankrupt act; and, on the fourth day of March following, was duly declared a bankrupt.

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*Bankrupt  
Act.  
Debtor and  
creditor.*

Subsequently to this and on the eleventh day of June one thousand eight hundred and forty-two, the complainants filed their bill in this cause, as judgment creditors, having previously recovered judgments upon which executions had

unable to perceive that the securities, in the present case, were taken in violation of this provision of the statute. The bond and mortgage were payable in one year with interest to be paid yearly as the same should accrue on the first day of November in each year. Their language, in this respect, is capable of being construed in harmony with the provisions of the 3d section of the act, by disregarding the first November after the date of the securities as a time of payment and treating the first payment of interest as having accrued on the first day of November 1838, which it seems proper to do in order to carry out the intention, very clearly expressed, that the interest should be payable "as the same should accrue yearly." Nothing remains to be considered but the defence of usury, which, as it seems to me, has altogether failed. The plaintiffs advanced their checks for the precise amount of the securities received from the defendants and it was by no act of the former that Mr. Clowes came to receive less than the full amount of the loan in money. His arrangement with Judge Cushman, by which the latter induced him to receive the stock in lieu of a part of the money, is not shown to have been known to the company, nor does it appear that they were or could have been benefited in any manner by the transaction.

The decree of the Supreme court must be affirmed.

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been issued and returned unsatisfied. The object of the bill was to reach property devised by the will of the father of the debtor—by breaking up the trusts and to have the property applied—not to payment of debts generally—but to the payment of their judgments as debts which had acquired a preference by the filing of the bill.

The defendant interposed a plea of his proceedings in bankruptcy; that the complainants had come in and proved their debts against him; that, by virtue of the § 5 of the bankrupt act, they had waived all right of action and suit against him; and that the judgments they had recovered were to be deemed surrendered thereby.

The complainants filed a replication to the plea, taking issue on it. The defendant having been declared a bankrupt, proceeded to obtain a discharge from his debts. His right to which the complainants contested; and, on a jury trial, the verdict was against him and his discharge was denied.

The complainants, then, filed a supplemental bill, setting forth the fact of the defendant being defeated in obtaining a discharge; and alleging that, although they had proved their debts against him under his proceedings in bankruptcy, such proofs were made, not for the purpose of claiming or securing any dividend, but wholly with a view to oppose and defeat the final discharge of the defendant and which they could not do under the act without proving their debts. They, therefore, insisted that their rights and claim against the defendant in this suit were altogether unaffected by the proceedings in bankruptcy; and that they were entitled to the same relief as if no such proceedings had been instituted.

The defendant interposed a demurrer to this supplemental bill.

Mr. *W. C. Wetmore* and Mr. *Bidwell* in support of the demurrer.

Mr. *Sedgwick*, for the complainants.

Dec. 10. THE VICE-CHANCELLOR :—The demurrer is well taken :

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v.  
CORSE.

1. Because, by operation of law, on the defendant being decreed a bankrupt, all his rights of property which the original bill and this supplemental bill were designed to reach, were divested and *eo instanti* vested in the assignee: see § 3 of the Bankrupt Act. The bill does not allege that the defendant has become entitled to any property subsequent to the decree declaring him a bankrupt.

2. Because the complainants elected to go in under the bankrupt proceedings and prove their debts; and, although they afterwards succeeded in defeating the defendant's application for a discharge, they are, nevertheless, precluded by the provisions of the § 5 from maintaining any suit at law or in equity for their debt and their judgments are to be deemed surrendered thereby: Prentiss, J. in 5 Law Reporter, 165; and Ware, J. Ib. 227, 228.

3. This § 5 does not involve an absurdity. Creditors may or may not come in and prove their debts. But, if they come in and prove, they become parties to the proceedings; and although they may defeat or prevent the bankrupt's discharge, they can only obtain or claim payment of their debts under and by virtue of the proceedings in bankruptcy. In case they do not prove their debts, they can still come forward as "other persons in interest" and contest the right of the bankrupt to a discharge or, in other words, show cause why his discharge and certificate should not be granted: § 4. If his discharge be refused or denied, the creditors who do not choose to prove and come in under the proceedings for a dividend may pursue their legal remedies against the debtor and compel payment when they can out of his future earnings or acquisition of property.

4. The complainants in this cause are not at liberty to allege that they proved their debts only for the purpose of opposing the discharge and not for the purpose of claiming or receiving dividends. The law gives them no such privilege. It does not allow them to prove their debts conditionally or under protest or qualification or with any reservation: Story, J. 5 Law Reporter, 447, 452.

For these reasons, I am of opinion that the complainants are precluded, by the decree in bankruptcy, which has vested all right of property in question in the assignee from

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pursuing the particular property in controversy in this court or elsewhere for their own benefit; and have, moreover, precluded themselves from having any remedy whatever against their bankrupt debtor.

Demurrer allowed, with costs.

SOUTHERN LIFE INSURANCE AND TRUST COMPANY v.
 DAVIS and others.

On a bill filed in the name of a company and J. B. and L. O. B. and the bill stating that the latter were the assignees of the company, a plea was interposed, denying that they were assignees and setting forth matter showing that, in a decree in another suit, their assignment was set aside and the property of the company was in receivers hands: *Held*, that this showing did not amount to duplicity.

Also held, that if it had been a mere naked plea of the decree, without an averment of its remaining in force, the plea would have been bad; but the positive averment that the said J. B. and L. O. B. were not assignees, coupled with the above (first mentioned) statement as to the decree, carried a sufficient implication that the decree was in force—and the plea was allowed.

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 1844.

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*Pleading.*  
*Plea.*

BILL filed, in the name of The Southern Life Insurance and Trust Company, a body politic and corporate, located and doing business in the city of Tallahassee in the Territory of Florida and Joseph Branch and Lawrence O. B. Branch of the same place, to set aside alleged usurious loans made by the defendant Thomas E. Davis to Lot Clark as agent for the said Southern Life Insurance and Trust Company. The following clause appeared in the bill: "your orators further show unto your honor that, on the thirtieth day of January one thousand eight hundred and forty-three, your orators the Southern Life Insurance and Trust Company executed to your orators Joseph Branch and Lawrence O. B. Branch a general assignment of all the property and effects of the Southern Life Insurance and

Trust Company for the benefit of the creditors thereof; and that your orators, the said Joseph Branch and Lawrence O. B. Branch, then accepted the said assignment and entered upon the duties of the said trust."

The defendant Thomas E. Davis interposed a plea, negating that the said Joseph Branch and Lawrence O. B. Branch were the assignees of the company, as follows :

"This defendant, by protestation, to all the discovery and relief sought and prayed by the complainants said bill of complaint, he, this defendant, doth plead and, for plea, he saith, that the said complainants Joseph Branch and Lawrence O. B. Branch are not the assignees of all or any of the property and effects of the said the Southern Life Insurance and Trust Company as claimed in the said bill of complaint and have no right to maintain this suit and ought not to have been made complainants or co-complainants therein. That on or about the third day of May in the year of our Lord one thousand eight hundred and forty-four a certain decree was duly made and entered in the Lever County Superior Court, Middle District of Florida in chancery (being a court of record of competent jurisdiction for the said Territory of Florida) in a certain suit then and there pending between Henry G. Guyon, John Lucas, John B. Carroll, Richard Edwards Junior, Benjamin B. Winn and Alonzo Cook, late, &c. and Thomas C. Rockhill & Co. complainants and the said The Southern Life Insurance and Trust Company, George Field, Robert Lyon, Tarbutt R. Bitton, John Miller, William Fisher, George E. Dennis, James Thomas Kennith Bembry, Ayles B. Shehee, Lewis H. Branch, Nathaniel C. Robbins, Lawrence O. B. Branch, Joseph Branch, Alphonse Loubat, Nathaniel D. Carlisle, Charles Barnard, Abel Adams, George M. Barnard and Charles Lurkin, Lowell Holbrook, Thomas S. Nelson and William E. Shepard, Erastus Corning, David Lee, John J. De Gruff, Robert Center and Edward C. Center, William S. Parker and John H. Prentiss, Louis Emile Lakens, Roskell, Ogden & Co. George Griswold, Lewis Curtis, John Horsly Palmer, ——— McKillop, ——— Dent, (trading as Palmer, McKillopp, Dent & Co.) Duff Green and Charles S. Sibley, defendants, wherein and whereby it was ordered,

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adjudged, considered and decreed that the assignments therein mentioned and referred to (including the assignment made and executed by the said The Southern Life Insurance and Trust Company to the said Lawrence Branch and Joseph O. B. Branch on the thirtieth day of January in the year one thousand eight hundred and forty-three) were and are fraudulent and void and were so decreed by the said court. That, in and by the said decree, it was further ordered that receivers be and they were thereby appointed to take charge of, manage, collect and receive all the property and estate of the said company—and all persons debtors of the said The Southern Life Insurance and Trust Company were, by the said decree, enjoined from paying to any of the defendants in the said suit (including the complainants in this suit) or any person or persons excepting the said receivers or their agent or attorney any amount or sums. As by the said decree or a duly exemplified and attested copy thereof, reference being thereunto had, will more fully appear. All which matters and things this defendant avers to be true and pleads the same to the said bill and humbly demands the judgment of this honorable court and humbly prays to be dismissed with his reasonable costs, &c.”

‘The plea now came up for argument.

Mr. *M. Hoffman* and Mr. *George Griffin*, in support of the plea.

Mr. *Brady*, for the complainants.

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 1845.

THE VICE-CHANCELLOR :—The fact tendered for an issue on this plea is, that the complainants Joseph and Lawrence O. B. Branch are not the assignees of all or any of the property and effects of the Southern Life Insurance and Trust Company as claimed in the bill of complaint, &c.

This plea goes to displace their right to sue—divesting them of all title under the assignment alleged in the bill—and showing that, at least, there is a misjoinder of complainants. If, in point of fact, these two complainants are not assignees, the effect of it is to abate the suit and either to put the bill out of court or to drive the other complainants

to amend before this defendant can be called on to answer it.

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With respect to the form of the plea, several objections are taken—none of which, however, seem to me to be tenable. After stating the fact that these two complainants are not assignees, as they claim to be, the plea goes on to state why and wherefore they are not and the means by which their assigneeship has been lost or taken from them. This is not duplicity in pleading. All the facts stated tend to but one point: that they are not assignees. If a replication is filed, that will be the issue. The judicial proceedings and decree alleged to have been made will be given in evidence in support of the plea; and the complainants will be at liberty to show that the court, making that decree, had not acquired jurisdiction over these complainants or, for some other reason, was not competent to make such a decree or that the decree is not final or has been reversed or set aside or is not in full force; and if any of these facts appear, the plea will be falsified. Hence, it appears to me that the plea is sufficiently full and explicit to raise the issue that is to be tried and to let in the evidence by which the fact of the complainants being assignees or not is to be determined.

I grant that if the defendant had nakedly pleaded the sentence or decree of the Florida Court, setting aside the assignment and placing a receiver in possession of the assigned property, the plea might have been deemed defective in not averring something more: as, for instance, that the decree remained in full force, unreversed, &c. But, as the plea avers, distinctly, that these complainants are not the assignees, &c. thus negating an allegation in the bill and denying the title or right of these two persons to become complainants—(and a pure negative plea may be pleaded)—it carries with it, most strongly, the implication that the decree remains in full force and has not been overturned.

On the whole, I consider that the plea is sufficient, both in form and substance. It must be allowed, with costs; and, on payment of such costs, the complainants may have leave to amend the bill by striking out the names of the Messrs. Branch as complainants.

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 v.  
 MCGOWN.

*Order entered* :—It is ordered that the said plea be and the same is hereby allowed with costs to the said Thomas E. Davis to be taxed, with liberty to the complainants The Southern Life Insurance and Trust Company to amend the said bill by striking out the names of Joseph Branch and Lawrence O. B. Branch as co-complainants, if they shall be advised so to do within twenty days after notice of this order, on payment of the said costs or if the said The Southern Life Insurance and Trust Company shall not elect so to amend, then, that the said complainants have leave to reply to the said plea and take issue thereupon within the same twenty days after notice of this order on payment of the said costs. And it is further ordered that in default of the said The Southern Life Insurance and Trust Company so amending the said bill or the said complainants replying to the said plea and taking issue thereupon as aforesaid, that the said bill of complaint be and the same is hereby dismissed as to the said Thomas E. Davis, with costs to be taxed.

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McDERMOTT, by her next friend v. McGOWN, Administratrix, &c. *et al.*

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A defendant, interested in three distinct suits, cannot, on abatement, revive all three by one bill of revivor and supplement.

A defendant cannot revive by bill before decree or decretal order giving a vested interest.

October 30,  
 1844.

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*Pleading.*  
*Bill of Re-*  
*vivior.*  
*Practice.*  
*Revivor.*

DEMURRER to bill, on the ground of multifariousness and for want of equity—taken by the defendant Maria McGown, administratrix of the estate and effects of Felix O'Neil, deceased.

It was a bill of revivor and supplement; and set forth the history of three distinct suits in this court—in all of which the present complainant was a defendant. One of

the suits was for foreclosure ; and a fund arising from a sale under it had been transferred to another of the suits. Replications had been filed in the latter suits and deaths had occurred, but there had not been decrees. *Prayer* of the present bill : " That all the suits and proceeds before mentioned may stand and be revived and be in the same plight and condition as the same were in at the time of the abatement thereof in manner aforesaid. And that all necessary and proper accounts may be taken to ascertain the rights and interests of your oratrix and orators in the several matters aforesaid ; and that what may, upon such accounting, be found due to your oratrix may be paid to or invested for her. And that your oratrix may be paid her costs and charges as well of the suits abated as aforesaid as of this suit ; and that she may have such further or other relief, &c."

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MCGOWN.

Mr. *John L. Mason*, in support of the demurrer.

Mr. *W. Silliman*, contra.

THE VICE-CHANCELLOR :—I am of opinion that the objection of multifariousness to the bill of revivor is well taken and the demurrer, on that account, would have to be allowed. The consequence of which, however, might be obviated by an amendment on payment of costs, instead of putting the bill entirely out of court.

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1845.

But the other objection, of a want of right or title in the complainant to file such a bill, appears to be a fatal objection to it, so as to require its dismissal. The chancellor holds the rule to be a strict one that before a decree or decretal order is made by which a defendant becomes entitled to an interest in the further continuance of the suit, neither he nor his representatives can sustain a bill of revivor : *Souillard v. Dias*, 9 Paige's C. R. 394. Neither of the suits sought to be revived had proceeded so far as to give this child any fixed or definite right of that sort. It comes, therefore, within that rule. If, in either of the suits, she, as a defendant, is in a position, under any of the provisions of the statute authorizing a revival at the instance of a de-

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v.  
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fendant, let her apply to the court by petition in the particular suit or suits ; but the chancellor appears to think that the provisions of the statute do not extend to the case of an abatement by death before an interest has been acquired by a decree or decretal order : *Ib.* 395.

The demurrer must be allowed ; and the bill be dismissed, with costs.

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WILLIS and another, Administrator, &c. v. ASTOR.

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A covenant to renew a lease at a certain rent, without stating what covenants the new lease should contain, does not carry any of the old covenants with it. Therefore, although an old lease contained a provision that the tenant should pay taxes and assessments, yet, as the lessor merely covenanted to make a new lease at a given rent and said nothing about covenants : *Held*, that he must give such new lease, exclusive of a covenant, on the part of the tenant, to pay taxes and assessments.

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BILL AND ANSWER.

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1844.

Landlord  
and tenant.  
Lessor and  
lessee.  
Covenant.  
Lease.

THE bill was filed for a specific performance of a covenant to renew a lease.

The defendant tendered a lease requiring the lessee to pay all taxes and assessments ; and the complainants declined to accept a lease on those terms. The question was, as to what covenants and conditions a new lease should contain.

The covenant in the old lease for a renewal will be found in the opinion of the court.

Mr. *J. L. Mason*, for the complainants.

Mr. *Jonathan Miller*, for the defendant.

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1845.

THE VICE-CHANCELLOR :—The defendant having elected not to pay for the improvements, but to grant a new lease—

as he had a right to do—the question is, about the terms and conditions of such new lease?

The covenant is not that the defendant would renew the old lease or grant a new one on the same terms and with like covenants as are contained in the old one; but the covenant is simply that, in the event which has happened, he would “make and execute a new lease of the premises for the further term of seventeen years at the yearly ground rent, which shall be equal to five per cent. interest per annum on the fee simple value of the lot, &c. the rent aforesaid payable quarterly.” That value has been fixed at three thousand dollars and the rent, consequently, at one hundred and fifty dollars. About this there is no dispute; and the question is, whether, in addition to a covenant to pay such rent, the lessor is entitled to a covenant in the lease that the lessees will pay the taxes and assessments chargeable upon the lot during the term?

It has long been the settled law of this state that a covenant or agreement “to execute a deed” or “to give a good and sufficient deed of land,” is fulfilled by executing a deed sufficient in form to pass the title without any personal covenant or warranty: *Van Eps v. The Corporation of Schenectady*, 12 J. R. 436; *Gazley v. Prince*, 16 Ib. 267. And in *Rutgers v. Hunter*, 6 J. C. R. 215, Chancellor Kent has said that covenants are the accidental and not the necessary parts of a lease; that a covenant even to renew a lease does not necessarily imply a lease with all the covenants in the former, but only a lease of the same term and rent. In this, he is supported by English authorities. Now, if a covenant to renew or to grant a renewal of a lease carries with it nothing by implication: how can it be that a covenant to give a new lease can have that effect? Here, Mr. Astor agreed to give a new lease for a term certain and at a rent to be fixed in a particular manner. He stipulated for and reserved to himself nothing more than the rent thus to be ascertained and to be paid quarterly. If he has now a right to insist on a covenant that the lessees shall pay the taxes and assessments as in the former lease, I do not see why, by the same reasoning, the lessees may not insist on

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v.  
ASTOR.

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v.  
CLARKSON.

the lessor's covenant to pay for the building or to grant another renewal, &c.

The court must construe the covenant according to its plain import as a court of law would do and not attempt to make a different covenant for either party according to what may appear to be equitable circumstances : Chambers' Land. & Ten. 226.

I must decree that Mr. Astor is bound to execute the new lease without the proposed covenant for the payment of taxes and assessments. What the effect of it will be, in regard to such taxes and assessments, if the lessor should not pay them after making such a lease, is not for me to determine at present.

Decree, for specific performance ; with costs.

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LIVINGSTON and another v. CLARKSON and others.

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A report of commissioners in partition will not be disturbed, save for causes which, at law, would allow of a new trial.

And such a report will be regarded with more respect than a verdict where the commissioners were selected by the parties in interest—and with particular reference to their qualification.

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Nov. 7.  
1844.

*Practice.*  
*Partition.*

A CASE of actual partition. The commissioners, William H. Wilson, William H. Dewitt and Henry Staats, had been named by the parties in interest as persons thoroughly competent and well qualified for the task assigned them.

Objections were taken by two of the defendants, Edward H. Ludlow and wife, to the report of these commissioners. First objection : That the valuation of the fee of each parcel of property was not set forth. Second objection : That a part allotted to two defendants was worth more, by two or three thousand dollars, than the commissioners had, in their division, considered ; and affidavits were added to the objections, in order to strengthen this point. Third objection :

That a piece of property, allotted to these exceptants at five thousand dollars, was not near of that value.

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LIVINGSTON  
v.  
CLARKSON.

Mr. *Mumford*, for Ludlow and wife.

THE VICE-CHANCELLOR:—The report of commissioners is to be regarded in the light of a verdict of a jury rendered upon a trial at law; and it will be disturbed or interfered with by the court only upon grounds similar to those on which a verdict would be set aside and a new trial granted: *In the matter of Pearl Street*, 19 Wend. 651.

Dec. 10.

Nay, more: it will be regarded with greater consideration even than a verdict, because, in this particular instance, the commissioners are persons who were selected by the parties themselves on account of their superior judgment and capacity to perform this particular service and they were authorized to act upon a personal view of the property and upon their individual knowledge of its value, location, &c. which they were left to acquire at their leisure and from all the best sources of information in their power and without regard to rules and forms of judicial proceedings in acquiring their knowledge.

The cases of *John and Cherry Streets in the City of New York*, 19 Wend. 659 and *William and Anthony Streets*, Ib. 678, are full of instances on that subject.

After a careful perusal of the affidavits submitted upon the objections taken to the master's report, I am satisfied that there is not the slightest ground, consistently with well established principles, to alter or modify the report in any one particular.

Order, that the objections be overruled, with costs.



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FREEMAN  
v.  
DEMING.

## FREEMAN v. DEMING and others.

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A defendant is not to be punished for an infringement of so much of a writ of injunction as goes further than the prayer of the bill.

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Nov. 11,  
1844.

*Practice.*  
*Injunction.*

ON a motion for an attachment for violating an injunction, it appeared that the working of the latter carried the enjoinderment further than the prayer in the bill.

THE VICE-CHANCELLOR, in the course of his opinion, observed :—The language of the injunction differs from the prayer of the bill ; but it is, nevertheless, to be understood as if it followed the prayer : and the defendants are to be enjoined no further than the bill requires.

Mr. *Dana*, for the complainant.

Mr. *A. P. Man*, for the defendant.

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LEWIS  
v.  
J. A.

LEWIS v. J. A.

In a dealing between solicitor and client involving the property of the latter, the former must place himself in the position of a stranger. He must be able to show that he has cut off, as it were, the connection which bound him to the client; that they have dealt at arms-length; and that nothing has happened which might not have happened had no such connection existed.

Equity interferes to help a client against the effect of a dealing with his lawyer on other ground than fraud. It is done from the fact of there being an inequality arising from confidence on the part of the client.

A solicitor, who had been long employed by a client, was applied to for the purpose of finding security for money. At first he was not successful; but, afterwards, he suggested having of his own properties, certain "very excellent" bonds and mortgages, but did not describe them or give the names of the mortgagors; and the client, at once, sent word that he could have the money. Whereupon, the solicitor sent his clerk with the bonds and mortgages and assignments thereof duly acknowledged; and the client gave his check. The latter, for some time, received the interest on them. The mortgagors in one or more of the cases had conveyed away the premises, subject to the mortgages. This was particularly the case as to one, where the interest was in arrear at the time the client received them and the mortgagor was insolvent soon afterwards. The property in this particular mortgage consisted of vacant lots and the ultimate holders at last refused to pay any more interest; and taxes and assessments came in arrear. No fraud was proved. The transaction occurred in February 1838 and the bill for relief was filed in May 1842. *Held*, that the solicitor was bound to take back this bond and mortgage and restore the amount paid for it, with interest, and reimburse prospective payments for taxes and assessments.

THIS case involved a matter of professional confidence and liability, arising from the fact of advance of money, by way of investment, on the assignment of bonds and mortgages by a solicitor to his client. Nov. 13, 14,  
15, 16, 20,  
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The decision of the court embraces the circumstances sufficiently. Solicitor  
and Client.

Mr. B. F. Butler, for the complainant.

Mr. M. Hoffman, for the defendant.

THE VICE-CHANCELLOR:—The bill, with the admissions in the answer and the proofs in the cause, present the fol- Sept. 9,  
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lowing among other facts :—That, in the year one thousand eight hundred and thirty-seven and for more than twenty years prior thereto, the complainant was personally and familiarly known to the defendant, who had been employed by him in his professional capacity as attorney, solicitor and counsel whenever the complainant required legal advice and assistance in the prosecution and defence of suits and in putting out money on bond and mortgage. The complainant was, moreover, in the habit of consulting him confidentially about other matters, not strictly within the line of professional business ; and the defendant frequently gave him advice about pecuniary affairs without charge. In the years one thousand eight hundred and thirty-three and one thousand eight hundred and thirty-four, the complainant was absent in Europe ; and, during his absence, the defendant held his power of attorney and, as his agent, superintended his affairs without compensation. All this inspired the complainant with gratitude ; and, from their long intercourse and intimacy of a friendly and professional character, the defendant had acquired—very deservedly so—the complainant's unbounded confidence in his personal integrity, professional ability and experience in business, including the investment of money on security of real estate in the city of New York. In the latter part of the year one thousand eight hundred and thirty-seven the complainant had considerable money on hand, which he wished to invest, with a view to obtain a regular and permanent income therefrom ; and he, then again, employed the defendant in his professional capacity to assist him in procuring its investment in good bonds and mortgages upon improved, productive and unincumbered real estate in the city of New York ; and which employment the defendant accepted and acted under. In the course of the residue of that year and during the year one thousand eight hundred and thirty-eight the defendant sent in various applications made to him for loans, all of which the complainant rejected as not being satisfactory ; and this was done with the knowledge of the defendant, who thereby became aware of the complainant's extreme caution about security and of his determination not to let his money go, except upon security of the most un-

questionable character—he preferring that his money should rather remain idle than be put out upon such property as should be deemed at all doubtful or troublesome. In consequence of the failure of so many of his applications, the defendant, at length, omitted to send him any more; and ceased to give himself any further concern about investments, although it would seem that the complainant still considered him employed for such purpose and that the defendant had not actually withdrawn from it as late as the month of October one thousand eight hundred and thirty-eight: for it is alleged that, about this time, the sum particularly named to the defendant in respect to which his employment related was twelve thousand dollars—and to this the defendant in his answer says and admits that, at some time pending their efforts to invest the funds, but when particularly he cannot say, he did ascertain the amount to be twelve thousand dollars or thereabouts.

On the twenty-seventh of November, one thousand eight hundred and thirty-eight, the defendant had purchased property in the country; and being in need of money to pay for it, addressed a note in writing to the complainant, inquiring whether he still had on hand the twelve thousand dollars and saying that he, the defendant, had “some very excellent mortgages which he should like to assign to him for that sum”? The complainant replied, in effect, that he still had the money on hand and that it was at the defendant’s service whenever he should choose to send for it and that he could make the sum twelve thousand five hundred dollars.

Accordingly, on the sixth of December one thousand eight hundred and thirty-eight, the defendant sent his clerk to the complainant, with five bonds and mortgages and an assignment of each, already executed, and a statement of the amounts in the aggregate, being a little over thirteen thousand dollars and requested his check for the whole sum. On looking at this statement, the complainant remarked that the amount exceeded the sum he had on hand, whereupon the defendant’s clerk withdrew one of the bonds and its accompanying mortgage from the parcel, being the smallest of the five; and the remaining four, amounting to twelve thousand two hundred and seven dollars and thirty-nine cents,

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were, on the instant, taken by the complainant and he gave his check therefor. Until that moment, the complainant had never seen the bonds and mortgages; and knew nothing of the mortgagors or the value, condition or location of the property mortgaged. And while he did not stop to examine them before he gave his check, all the information he received of those particulars was from the defendant's clerk as he handed over the papers who told him that the Harris bond and mortgage (being one of the number) was on property in McDougall street, that Messrs. Herricks, flour merchants; who were wealthy men, were the owners and that they paid the interest, that another called the Wentworth bond and mortgage was on property in Bond street and that Wentworth was a builder, that the next was the Bogert bond and mortgage on property in Spring street and the owner was a very punctual man in the payment of the interest; and that another was the McVicar bond and mortgage, which was a security on lots at Chelsea. That Dr. McVicar was a professor in Columbia College and that he had sold the property to Henry J. Seaman, a merchant in Pearl street. This information was volunteered and not elicited by any inquiries made by the complainant.

It further appears that, in sending the papers in the manner before stated, the defendant did not propose or offer to submit the papers for examination or to give time or opportunity for the complainant to obtain information from other sources as to the sufficiency or value of the securities before closing the bargain; and that all that the defendant did was to write a note to the complainant, by his clerk, saying "William will hand you assignments of mortgages, with a memorandum, showing the amount due on each. Give him your check for the amount. The assignments are all acknowledged, but you need not record them. This must be done whenever any of them are paid off." The assignments contained no covenant or guaranty. The McVicar bond and mortgage so called had been taken by the defendant on the thirty-first day of December one thousand eight hundred and thirty-six on two lots of ground, one fronting on Nineteenth street and the other on Twentieth street; to secure the payment of three thousand five hundred dollars, with inte-

rest. On the bond was a memorandum made by the defendant, stating that the interest was paid upon it to the thirtieth day of June one thousand eight hundred and thirty-eight and, from that period, the interest was computed and added to the principal, making, together, three thousand six hundred and six dollars and fourteen cents—and that being the consideration paid for the assignment of this bond and mortgage.

In taking the bonds and mortgages and parting with his money in the manner described, the complainant believed he was obtaining ample security, not only for the principal but for the punctual payment of the interest as it should become due and that the property, in each instance, was of sufficient value to afford that security and not affected by unpaid taxes or assessments so as to interfere with the first lien of the mortgages, and that each bond was the bond of a solvent and punctual obligor in respect to the payment of interest and, so far as the property was in the hands of subsequent purchasers, that they punctually paid and would continue to pay the interest. All this belief was induced by the confidence he had been led to repose in the defendant and more especially by the representation made in respect to the excellence of the securities.

The fact is also apparent that the defendant expected the complainant would take the bonds and mortgages and furnish the money immediately, without stopping to make inquiries or to seek for information elsewhere concerning their value and sufficiency; and that he would be governed entirely by his confidence in the defendant and by a desire to meet his wishes and not be governed by any independent judgment of his own or actual knowledge of the character of the securities.

It then appears, with respect to the McVicar bond and mortgage, (and about which the controversy has arisen) that when the half year's interest became due after the assignment, the complainant ascertained that Anderson and Richards held the title to the lots under a conveyance from Seaman the mortgagor's grantee. On being called on, they paid him the interest on the bond; and continued to pay the interest from time to time down to the first day of April one

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thousand eight hundred and forty. But after that, they refused to pay any more, because the lots were unproductive and not of sufficient value to justify them in doing so.

Failing to obtain payment of the interest any longer from that quarter, the complainant sought Mr. McVickar, who stated to him the fact of his having parted with the property, subject to the mortgage, and that his personal security, if looked to, was not available; that he did not hold himself bound, but, if bound, it was no security.

He also ascertained that the lots were at that time (April 1840) of insufficient value to satisfy the mortgage debt and that taxes had been suffered to get in arrear and remained unpaid: and also that there were some assessments, under corporation ordinances, which had not been paid and for which the property was liable.

Under these circumstances, the complainant applied to the defendant to take back the bond and mortgage and refund the money and the interest due thereon, which the defendant declined doing. The complainant then offered to put the bond and mortgage in suit against the land and against the persons who might be liable for the debt, provided the defendant would consent it should not prejudice any claim he might have upon the defendant; but the defendant refused to make any such arrangement.

The complainant has, therefore, filed his bill to have the money which he paid upon the assignment of the McVickar bond and mortgage restored, with interest; and be reimbursed such sums as he has since paid for taxes and assessments on the mortgaged property—the complainant being ready and willing and offering by his bill to reassign the bond and mortgage to the defendant.

The bill was filed for this purpose on the thirty-first day of May one thousand eight hundred and forty-two; and, since filing it, the complainant has advanced other sums by consent and without prejudice for other taxes, &c.

From the foregoing statement it will be perceived that the complainant seeks to be relieved from the bond and mortgage in question; not on the ground of any intentional fraud practised upon him (for fraudulent motive or design in the transaction has not been imputed and is not imputable to

the defendant) but, upon a ground equally efficacious for rescinding the contract in the view of a court of equity, where the facts will warrant it. And that is, that the parties stood in the relation of solicitor or counsel and client towards each other; and, owing to such relation, that they dealt in the matter of the bonds and mortgages assigned by the defendant upon unequal terms—one reposing entire confidence in the other and exercising no judgment of his own in respect to the value, sufficiency or goodness of the securities. It is obvious, says Judge Story, “that the relation of client and attorney or solicitor must give rise to great confidence between the parties and to very strong influences over the actions and rights and interests of the client. The situation of an attorney or solicitor puts it in his power to avail himself not only of the necessities of his client but of his good nature, liberality and credulity to obtain undue advantages, bargains and gratuities. Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament but it often interposes to declare transactions void which, between other parties, would be held unobjectionable. This it does, not so much on account of hardship in the particular case as for the sake of preventing what might otherwise become a public mischief.” He goes on to say, “it is not necessary to establish that there has been fraud or imposition on the client. On the other hand it is not necessarily void throughout *ipso facto*. But the burthen of establishing its perfect fairness, adequacy and equity is thrown upon the attorney: upon the general rule that he who bargains in a matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence”: Story’s Com. sec. 308 to 312.

The doctrine thus laid down is found in a great number of well adjudged cases; and nowhere is it more clearly shown than by Lord Brougham in *Hunter v. Atkins*, 3 Myl. & K. 11 and by V. C. Hoffman in *Berrien v. McLane*, 1 Hoff. R. 421.

Lord Brougham’s remarks are to this effect: that an attorney, dealing with his client, takes upon himself the burthen of proving that he has dealt exactly as a stranger would

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have done; taking no advantage of his influence or knowledge; putting the client on his guard; and bringing every thing to the client's knowledge which he himself knew. In other words, the attorney must show that he has placed himself in the position of a stranger; that he has cut off, as it were, the connection which bound him to the client; that they have dealt at arms-length; and that nothing has happened which might not have happened had no such connection existed. This doctrine seems to me to apply, in all its length and breadth, to the present case.

It is impossible not to see that such a relation existed between these parties at the time of the transaction in question—not that there was any suit or litigation actually pending to which the complainant was a party: but there was the general habit of employing and being employed whenever professional services were required and particularly in respect to the investment of this very money. This latter business had not been withdrawn, although the defendant may have ceased to take any pains to accomplish it. When the time should come to put out the money, the complainant would doubtless have relied upon the defendant's professional aid, at least so far as to see that the securities were taken in due form and that the title was good. Nothing had occurred to induce either party to wish for a change of the relation which had existed so long of a regular client on one side and an attorney, solicitor and counsel on the other, nor to diminish the confidence which the former had always reposed in the ability and integrity of the latter. Hence the relation continued and, co-extensive with it, the influence which it is supposed to give.

In order to relieve the defendant from the obligation which this influence or presumption gives rise to, it should be made to appear affirmatively that, before the transaction or dealing took place, the employment had ceased; and that the relation was completely at an end, so that no influence could rationally be supposed any longer to exist: 18 Vesey 127 Such does not appear to have been the case in this instance.

It is true, that the defendant's employment in the business of investing the complainant's money on bond and mortgage

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did not require of him to judge of the value of the property on which it should be bound or of the solvency or ability of the borrower to pay the interest punctually. I am satisfied, from the testimony, that neither the defendant's habits of business nor any thing which he assumed to do in this particular instance led the complainant to expect that he would take that responsibility. Those were matters which the complainant was to judge of and determine for himself. All that would have been required of the defendant, if the loan had been made to a stranger or third person, would have been to see that the mortgage, taken as security, was founded on a good title ; that the property was free from charge or incumbrance ; and that the necessary papers were prepared in due form and properly executed. And so, if, when he made his application to the complainant for the money on his own account, he had said to him : " I have mortgages of such and such persons on such and such pieces of property, of such and such amounts ; they are founded on good titles and that I can vouch for, but go yourself and examine the property, ascertain its probable value, inquire as to the standing of the bondsmen and, if you shall be satisfied that the securities are ample and sufficient, then let me have the money for them"—in such a case, he would have stood free in the matter. But this he did not do. Instead of putting the complainant on inquiry as to those particulars and leaving him to form his own judgment of the sufficiency of the securities, he, in the haste and precipitancy of the moment, assumed to judge for him ; and gave no time or opportunity for any other determination. The fact of his representing the mortgages as " very excellent" and asking for the money at the instant of sending the papers with assignments already executed, were calculated to inspire confidence and to disarm the complainant of all that prudence, foresight and caution which he would naturally enough have used, had he been dealing in the matter with a stranger : especially when it was not proposed to furnish them with any collateral guaranty for the ultimate payment of the mortgages. Under these circumstances, it seems to me not unreasonable to say that the defendant has assumed, perhaps unconsciously, a responsibility beyond what would have rested

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upon him had he merely attended to the putting out of the money to a third person as a matter of professional business—a responsibility growing out of the confidential relationship in which the parties stood towards each other and the peculiar manner in which the transaction was brought about and consummated—not that there was fraud or bad faith in it—not that the defendant supposed, at the time, that any of the mortgages were other than “excellent securities” when he thus spoke of them—but because, if they were not so, there would be a breach of confidence which it is as much the policy of the law and the duty of the court to guard against and to remedy in behalf of the client as it is to guard against and redress a fraud.

Having shown that the law placed the defendant in a situation of responsibility towards the complainant (his client) commensurate with the confidence that the latter reposed in him, the next inquiry is: whether the McVickar bond and mortgage afforded an adequate security for the principal and interest which it purported to secure? This inquiry must be made with reference to the time of the assignment and to the subsequent period down to the month of May one thousand eight hundred and forty-two, when the bill in the cause was filed.

I assume, for the circumstances of the case require I should, that the complainant was entitled to securities which would be ample for the ultimate payment of principal and interest and such, moreover, as the interest was regularly paid upon and would continue to be paid upon as it should accrue; and such, doubtless, the defendant intended to give him when he assigned the several bonds and mortgages. The bond and mortgage in question, however, were not of that character. The interest had not, in fact, been paid upon the bond for some time previously, although a memorandum had been made upon it by the defendant showing that the interest was paid up to the thirtieth day of June one thousand eight hundred and thirty-eight. That endorsement was founded in mistake, as the testimony shows; and was not made designedly to mislead. It also appears that the mortgagor had become embarrassed; and had, as early as December one thousand eight hundred and thirty-seven,

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executed a bill of sale of his personal property in payment of or as security for a simple contract indebtedness he was under and that, in November one thousand eight hundred and thirty-eight, had ceased to meet his other engagements as they became due. So far, therefore, as the security was to depend upon the individual and personal responsibility of the mortgagor and only obligor in the bond, even for the regular and punctual payment of the interest, it had already proved a failure. But the mortgaged lots were in the hands of subsequent grantees; and they were expected to pay the interest. This expectation was realized until the first of April one thousand eight hundred and forty, when that also failed—the purchasers or those holding the legal title, deeming the lots, at that time, of insufficient value, refused to make any further payment of interest, preferring rather to abandon them. In this fact, we have some evidence of an inadequacy of security in the mortgage as well as in the bond. There is further evidence on that point. The testimony of a number of witnesses, experienced in the business of selling lots and acquainted with their market value during the period from one thousand eight hundred and thirty-eight to one thousand eight hundred and forty-two inclusive, prove that the lots in question would not have brought the amount of the mortgage debt at any time within that period, while other witnesses estimate the lots to be intrinsically worth the amount of the mortgage. But the question is, not what the lots are worth in the opinion of witnesses, but what would they bring at auction on a forced sale? for this must be the criterion of value when the adequacy of a mortgage security is involved. That the mortgage in question was not, when assigned or at any time since “an excellent mortgage” is quite manifest. To be excellent, it should be remarkable for good properties—such as having an accompanying bond of a solvent obligor who is punctual in paying his interest and covering property at all times of sufficient value to produce the amount of the debt, if sold. This mortgage was considerably short of that standard. In the year one thousand eight hundred and thirty-six, when the mortgage was taken, it was undoubtedly good, according to the then estimated value of the lots. The tes-

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timony shows that the defendant loaned the amount for which it was given, in cash, and deemed it a perfectly safe investment; and there is no reason to suppose that he knew it to be otherwise in the year one thousand eight hundred and thirty-eight. But, at this time, the lots had greatly depreciated, as was the case every where with real estate. Added to this was the intermediate insolvency of the mortgagor. These facts, the defendant did not stop to consider. He acted hastily in inducing the complainant to take the bond and mortgage for its full amount; and though innocent of any intentional wrong, he has gained an advantage solely from the confidence that was reposed in him—which the policy of the law forbids he should retain.

The existence of an assessment and of an unpaid tax upon the lots at the time the mortgage was assigned, must not be lost sight of as furnishing an additional ground of relief. The complainant never agreed to take the mortgage with charges upon the property which took precedence of the mortgage debt so long as they remained unpaid; and the defendant was bound, by his professional engagement, to inform him of those charges before calling on him to part with his money or else to indemnify him for the loss. This might be a ground for claiming an indemnity merely; and not for rescinding the contract of assignment.

It has been contended, that the other and principal ground of relief does not require that the transaction should be rescinded, only that the defendant should be held liable as surety to indemnify and make good any loss after the remedy upon the bond and mortgage has been exhausted; and hence, that the bill was prematurely filed. I am satisfied, however, that the principal ground is one for annulling the contract, so far as concerns the McVickar bond and mortgage. Again: It is argued for the defendant that the delay in offering to return the bond and mortgage amounts to a waiver of the complainant's right to return them—that, having repeatedly received the interest from those persons whose business it was to pay it, he has acquiesced in the title by the assignment and is now too late in seeking to reject it. With regard to the delay, it can avail the defendant nothing: unless he could show that it has been prejudicial

to him—which can hardly be pretended. The bond and mortgage were offered to be returned as soon as the complainant failed to obtain payment of the interest ; and there was no acquiescence in the title by which he held them after he discovered the true condition of things and how he had been misled with respect to the goodness and sufficiency of the securities.

I can perceive no good reason, therefore, for relieving the defendant from his liability to take back the bond and mortgage and to restore the money, with the interest from the time the latter has remained unpaid, namely, from the first day of April one thousand eight hundred and forty—and to reimburse to the complainant the amount he has paid for taxes and assessments ; and this to be done on the complainant's reassigning to him the bond and mortgage.

Decree accordingly, with costs.

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JONES and another, acting Executors, &c. v. ROBERTS and  
LAWRENCE.

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Where the insolvency of defendant L. is positively alleged, it will amount to impertinence for defendant R. to undertake to show the contrary by hypothetical statements and the opening of long settled accounts and adjusted balances.

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A QUESTION upon an exception taken to the answer of the defendant Seth B. Roberts for impertinence. The bill alleged the insolvency of the other defendant Lawrence ; and this point was met by the defendant Roberts—as will be sufficiently seen by a reference to the opinion of the court.

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Pleading.  
Answer.  
Exception.

Mr. D. S. Jones, for the complainant.

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Mr. *D. P. Hall*, for the defendant Seth B. Roberts.

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THE VICE-CHANCELLOR :—The only exception brought before me for consideration is the exception for impertinence to a part of the answer of the defendant Roberts to the amendments of the bill. It arises out of the answer to amendment No. 2. It appears to me that all such part of the answer which undertakes to show that the defendant Lawrence was not insolvent, notwithstanding his failure, provided justice was done him by restating the accounts between him and the testator's estate and striking a large balance in his favor instead of a large balance against him, as was ascertained by Master McDonald's report in the year one thousand eight hundred and thirty-two, is impertinent. This accounting, before an officer of the court and under its order, became final and conclusive. It established a large debt against the defendant Lawrence, which he took no legal measures to shake off; and, in consequence, he must be deemed to have acquiesced in its being for ever fastened upon him. As he cannot, now, be permitted to disturb that settlement, so neither can a third person or stranger. Nor can such an overhauling of the accounts, as this answer sets up, be allowed in a collateral suit or proceeding.

It is clear to my mind that the defendant Roberts cannot be permitted to show, in this way, that the defendant Lawrence was not insolvent in the year one thousand eight hundred and thirty four and continued so to the present time. All this statement in the answer, therefore, is impertinent.

But the question still is: whether the exception, as taken, does not cover too much ground? The defendant insists that it embraces words which are fairly responsive to the bill and ought, consequently, to remain; and that, if any part of the exception is improper, the whole of it must fail. Owing to the peculiar phraseology of the answer in the 16th folio and again in folio 41, it is rather difficult to say that there are not some expressions of denial, meeting directly the alleged insolvency, its continuation and the defendant's knowledge of it; but, in the 42d folio,

we are presented with a denial on those points so full and complete as to render the previous passages unnecessary. I shall, therefore, concur with the master and allow this exception.

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Order accordingly.

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H. Z., by his will, gave the rents and profits of his real and personal estate to his wife for life, if she remained his widow; but if not, then, he authorized and empowered his executors to let, sell or dispose of his real estate or such portion as the major part of them should think proper in their discretion and make and execute conveyances; and in case his executors should judge it necessary to sell and dispose of such real estate or any part of it, then, to place the nett proceeds at interest and such interest to be paid to his wife for life. After her death, the then remaining part of his estate, real and personal, was to be converted into cash and placed out at interest for the benefit of his son J. H. Z. and the interest given to him during life. And after wife's death, he gave and devised his estate to the children of his said son. The son died before the widow, leaving two children; and the widow married again and then died. The executors had not sold the real estate, but leased it during the widow's life: *Held*, that the executors had a naked discretionary power, which they used by so leasing during the widow's life; and as the son died in her life time, their power ended with her death: and that which was real estate went, as such, to the son's children and was not, then, to be considered as if converted into personalty.

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BILL AND ANSWER.

It appeared by the bill that Henrick Zimmerman made his will on the eleventh day of February in the year one thousand seven hundred and eighty-seven, containing the following clauses: "Third, I do give and bequeath unto my said wife the rents, issues and profits of all my estate, both real and personal, of what nature or kind soever, during her natural life, if she so long remains a widow; but in case my said wife shall remarry, then and in such case I

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"do will, order and direct and I do hereby authorize and empower my said executors or the major part of them to lease, let, sell or dispose of my real estate or such part thereof as they or a major part of them think proper, which I leave wholly to their discretion ; and make and execute good and sufficient conveyances and assurances in the law to the purchasers thereof—and upon the sale thereof or in case the same shall be let, the proceeds to be applied as hereinafter directed. And upon the remarriage of my said wife, I do order and direct that she deliver unto my said executors or either of them all monies, bonds, notes and accounts whatsoever that may, then, be remaining in her custody and possession ; whereupon it is my will and I do order and direct that the rents, issues and profits of all my estate, both real and personal, be paid to my said wife during her natural life. And in case my said executors shall judge it necessary to sell and dispose of my said real estate or any part thereof, to place the nett proceeds at interest—and the interest be paid to my said wife as aforesaid. Fourthly: After the decease of my said wife, I do will, order and direct that all the remaining part of my estate, both real and personal, be converted into cash ; and that the same be placed out at interest by the survivor or survivors of my said executors for the benefit of my said son John Henrick ; and the interest arising therefrom I do give and bequeath to my said son John Henrick during his natural life ; but in case my said son John Henrick shall, at any time, be in such a reduced situation that he may require further assistance, then and in such case I do authorize my executors or the major part of them, if they shall judge it expedient to advance to him any sum of money that they may think proper to relieve his then present necessity. Fifth: After the decease of my said wife all my estate of what nature or kind soever I give and bequeath unto the children of my said son John Henrick, lawfully begotten or to be begotten and to the survivor and survivors of them, share and share alike, to be paid to them as they respectively attain to the age of twenty-one years ; but in case my said son John Henrick shall have no issue lawfully begotten in two years after the decease of my said

"wife, then, I do will, order and direct that my said son John Henrick receive from my said executors or the survivor of them the whole remaining part of my said estate to his own proper use and behoof. Sixthly: I will, order and direct that my said wife have full power, at her will and pleasure, at any time she may think proper, to give to my said son the sum of fifty pounds current money of the State of New York. And I hereby nominate my said wife to be executrix and my friends David Grim of the city of New York, yeoman, and Leonard Fisher, peruke-maker, of the said city to be executors of this my last will and testament."

It also appeared (by the bill) that the testator died leaving him surviving his said son John Henrick Zimmerman and his said wife Anna Margareta Zimmerman. That the persons named as executrix and executors in the will proved the same. That the said Ann Margareta, the widow, intermarried with one ——— Keyser and died about the nineteenth day of July one thousand eight hundred and twenty. That the said John Henrick Zimmerman, previous to the death of the said Anna Margareta, departed this life intestate a very few days after the death of his father—leaving him surviving two daughters, namely, Margaret and Eve. Margaret became the wife of the complainant Daniel Slocum and Eve was married to William Reynolds. The bill charged that the executrix and executors had not sold the testator's real estate nor any part of it during the lifetime of the said widow, nor had the surviving executors done so since her decease, nor, in any way, converted it into cash, nor placed the same out at interest for the benefit of the said son John Henrick Zimmerman, nor invested any proceeds of the same in the manner and for the purpose in the said will directed; but that it had ever since remained unsold and unconverted and continued unapplied. That the said surviving executors treated the land embraced by the will as real estate and not as personalty, notwithstanding the said second marriage of the said Anna Margareta with the said Keyser; and leased the same for her life, instead of selling and investing the money as (the complainant insisted) the will directed. That the said William Reynolds and Eve his wife and this complainant and

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Margaret his wife, having no counsel and being guided by others (the executors) did execute a partition deed between themselves, dated the twelfth day of April one thousand eight hundred and nineteen, dividing the said land, being lots in the tenth ward in the city of New York, between them and took possession accordingly. The bill went on to show the death of Reynolds and wife and of the complainant's wife; and that, by the latter, the complainant had the children made defendants herein—all of whom were of age. He insisted that, notwithstanding the circumstances, the property was to be looked upon as personalty; and prayed accordingly.

The answer (*inter alia*) insisted and submitted as follows:

"That, inasmuch as the said David Grim and Leonard Fisher, being a majority of the said executors, did, upon the remarriage of the said widow of the said testator, lease the said lots as is stated in the said bill of complaint and admitted in this answer for the natural life of the said widow, they did thereby fully exercise the said discretionary power vested in them by the said testator; and that the said complainant has no right to claim that they should have exercised their discretion differently and instead of leasing the said real estate should have converted it into personalty. And these defendants also humbly submit and insist that, by the true construction of the said will, the order and direction to the said testator that upon the decease of his said wife all the remaining part of his estate, both real and personal, should be converted into cash and the same be placed out at interest by the survivor or survivors of the said executors for the benefit of his said son John Henrick and the interest given and bequeathed to his said son John Henrick during his natural life, were intended by the said testator solely and exclusively for the benefit of his said son; and that, inasmuch as it is stated in the said bill and admitted in this answer that the said son John Henrick died previous to the death of the wife of the said testator, so that the object of the power to sell was gone, the power itself and the right to exercise the same were gone with it;

and that, accordingly, the said two grand-daughters of the said testator were seized of the said lots as real estate, free and clear of any power in the said surviving executors or executor to sell or dispose of the same. And these defendants say that the said complainant has not alleged or shown, in and by his said bill, that he has taken out letters of administration upon the estate of his said wife Margaret; and they submit and insist that if the said estate of his said wife were to be looked upon as personal and not real estate, which, however, they expressly deny to be the true construction of the said will, the said complainant would not be entitled to the interposition and aid of this honorable court, except in the capacity of such administrator; and that the want of such letters is a full bar to this suit and as to all the relief sought for in and by the said bill, so far as the said suit and the said relief relate to the claim of the complainant to have the said real estate of the said testator converted into personal or to have the same looked upon in equity as converted into personal or to be treated in any manner as personal under and by virtue of any power or powers in the said will. And, although, for the greater satisfaction of this honorable court, these defendants have, in manner aforesaid, fully answered, as they believe, the charges made against them in the said bill, yet, they, by no means waive any defence to which they may be entitled by virtue of the said want of such letters of administration; and pray all benefit and advantage by means thereof to which they could be entitled by way of demurrer, plea or otherwise."

Mr. *Judah*, for the complainant.

Mr. *J. R. Townsend*, for the defendants.

THE VICE-CHANCELLOR:—This case falls within the principle of the cases of *Jackson v. Jansen*, 6 J. R. 72, and *Sharpsteen v. Tillou*, 3 Cow. 651. The power to sell and convert the real estate into money was a mere naked power in the executors—not imperative on them, but resting in discretion. They had an election to sell or not, on the

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SLOCUM.

widow's remarrying or in case the son John Henrick Zimmerman became entitled to the rents and income during his life. This power was conferred for the purpose of facilitating the management of the estate by the executors during the two successive life estates. As the son died before the mother, one object of the power failed; and during the mother's life they did not find it necessary or advisable to exercise the power of sale. When, therefore, on the death of the widow, the property came to the two daughters of John Henrick as devisees of the remainder, it came to them as real estate and so it was treated by the two daughters and their husbands in the deed of partition. When the grand-mother died, there was no longer any existing purpose or object of selling and converting the realty into personalty. In order to work out the right which the complainant's bill seeks to establish, it must appear that the conversion was intended for the purposes of the will and likewise for all intents and purposes whatsoever: Leigh and Dalzell, 128; Ib. 136, 137.

I am clearly of opinion that the property did not come to Mrs. Slocum and Mrs. Reynolds impressed with the character of personalty; and that the complainant is not entitled to have it so considered.

Decree, dismissing the bill, with costs.

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WESTERVELT  
v.  
HAFF.

WESTERVELT, JR. v. HAFF and others.

Even though an appeal from a decree made by the vice-chancellor may affect unjustly a third party (defendant)—as where a first mortgagee is fully recognized, but the mortgagor appeals so as to cover the phraseology which applies to his security and payment and obtains a stay—the vice-chancellor cannot relieve him: he must apply to the chancellor.

BILL of foreclosure. A mortgage for \$1000 had been made to the complainant by the defendants John P. Haff and wife on certain undivided real estate and a part of which estate was known as No. 38 McDougall street, New York. A prior mortgage had been executed by the same parties on the last mentioned property to Francis W. Speck, who was made a defendant and had put in an answer and who was recognized as a prior incumbrancer as to No. 38 McDougall street.

Dec. 26,  
1844.

Practice.  
Appeal.  
Jurisdiction.  
Mortgage.

A decree for sale had been obtained; and in it would be found the following passages:

"— It is ordered, adjudged and decreed and this court, by virtue of the power and authority therein vested, doth order, adjudge and decree that the said mortgage to the said complainant for \$1000 became and was a good and valid lien in equity upon the said two lots numbers 185 Prince street and 38 McDougall street, more particularly described in the bill of complaint in this cause and also hereinafter described upon the purchase by and the conveyance to the said John P. Haff of the same as aforesaid and that the same is a prior lien in equity to the said mortgage of the said defendant Abigail Haff for the sum of \$1450. And that the said complainant is entitled to the payment of the principal and interest due on the said bond and mortgage out of the said last mentioned lots Nos. 185 Prince street and 38 McDougall street after the satisfaction of the said mortgages to the said defendants Francis W. Speck and Hiram Walworth" — "(decreed) that all and singular the said premises Nos. 185 Prince street and 38 McDougall

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street mentioned and described particularly in the said bill and hereinafter also particularly described or so much thereof as may be sufficient to raise the amount to be reported due to the said complainant and the said defendants for principal, interest and costs in this cause and which may be sold separately without material injury to the parties interested be sold at public auction, &c." "—— and that the said master pay to the said Francis W. Speck or his solicitor, out of the proceeds of the sale of the said lot No. 38 McDougall street, &c." —— "and out of the balance of the proceeds of the sale of the said two lots 38 McDougall street &c. remaining to pay to the complainant, &c." —— "and that he bring the surplus moneys arising from the said sale (if any there be) into court without delay to abide the further order of the court."

The mortgagor, John P. Haff, appealed from the decree after the master had advertised a sale, such appeal embracing the parts we have above given; and it was so taken as to cause a stay. The defendant Francis W. Speck now presented a petition; and therein prayed that so much of the decree as was unappealed from might be enforced; that the property No. 38 McDougall street might be sold by a master; and that, out of the proceeds of the sale, the master pay the petitioner—and all balance abide the event of the appeal.

Mr. H. M. Western, for the petitioner.

Mr. R. TenBroeck, for the complainant.

Jan. 6,
 1845.

THE VICE-CHANCELLOR:—The defendant, Francis W. Speck, must apply to the chancellor to dismiss the appeal, so far as it is taken from that part of the decree which directs a sale of the premises No. 38 McDougall street; for, as to that portion as well as other parts appealed from, I am apprehensive the appeal operates as a stay by virtue of the 86 § section of the statute relating to appeals. At the same time, I certainly think it ought not to have the effect of delaying Mr. Speck in the recovery of his mortgage debt; but still I see no other course for him to take, except that of ap-

plying to the chancellor to dismiss the appeal so far as it stands in the way of a sale for his benefit.

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VAN CORT
vs
VAN CORT.

VAN CORT v. VAN CORT.

On an application for a new trial of a feigned issue in a divorce suit, the affidavits brought before the court on both sides are to be taken together to ascertain whether there is a ground for disturbing the verdict within any principles governing courts on the granting new trials in such cases; and if not, then the only consideration for the court is, whether the judge, on the trial, erred in admitting or rejecting testimony or in giving any directions or in any law points whereby injustice has been done.

Although witnesses, on a feigned issue, have been examined to matter foreign to the issue and they have been excepted to, yet if no use is afterwards made of their testimony, it is to be presumed that it has not influenced the jury and will not be ground to disturb the verdict.

Where a witness has been examined and cross-examined, it is in the discretion of the judge to permit the cross-examination to be resumed. The refusal is not a ground for a new trial, unless the defendant can show he has lost the benefit of material disclosure.

On a feigned issue in an adultery case, the husband of the woman with whom the defendant is charged to have had connection is a competent witness.

After the evidence of a woman, alleged to have been the adulteress, was through, other witnesses were brought to prove her conversations and declarations touching some or the matters she had been examined about and involving her conduct and that of the defendant charged with the adultery: *Held*, that their introduction was not improper.

THIS suit came before the court on a case for a new trial at law of a feigned issue. The bill was for a divorce by a wife, Eliza Van Cort, against the defendant, Charles J. Van Cort, on the ground of adultery. The jury had found that the defendant had committed adultery. The decision of the court contains sufficient of the facts.

Dec. 11,
14, 24.
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Divorce.
Adultery.
Feigned
issue.
New trial.

Mr. A. J. Spooner and Mr. Whiting, for the defendant.

Mr. J. Dikeman and Mr. Greenwood, for the complainant.

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VAN CORT.

May 14,
1845.

THE VICE-CHANCELLOR :—On the testimony presented, I am well satisfied, as the circuit judge was, that it warranted the conclusion of the jury ; and, therefore, that the verdict is not to be set aside on any ground of want of evidence to support or of a preponderance of proof against it.

I am, likewise, satisfied that the affidavits got up for the purpose of aiding the motion for a new trial, especially when taken, as they must be, in connection with the opposing papers, do not furnish a sufficient ground for disturbing the verdict. They do not show surprise, accident, the misconduct of a witness or of the opposite party in preventing a fair trial or newly discovered evidence within any acknowledged principle governing the court in granting new trials for such causes. If, then, the defendant is entitled to a new trial, it must be because the judge erred in admitting or rejecting evidence on the trial or in the directions he gave in relation to some point of law by which injustice has been done to the defendant and an unrighteous verdict obtained.

The first objection relied upon is : to the testimony given on the trial by the two police officers Stewart and Joseph. Their testimony certainly appears to have been foreign to the case and entirely immaterial to the issue. It was, for that reason, excepted to ; but, as no use was afterwards attempted to be made of the testimony, by connecting the parties or either of them with the fact proved by these two witnesses, it may fairly be presumed to have had no influence whatever on the minds of the jury. The objection was, not to the competency of those men as witnesses, but to their testimony after it had been given ; and it does not appear but that the defendant had the full benefit of his objection. Hence, it is not a ground for interfering with the verdict.

The next objection taken on the trial was, that the defendants were not permitted to resume the cross-examination of Lyon, a witness, after his examination on both sides had been closed. I consider that, after what had been done, it was a matter resting in the discretion of the judge to permit or not—as he might think proper—the examination of the witness to be resumed ; and that his refusal to allow it is not a ground for a new trial, unless the defendant could show that he had lost the benefit of some material disclosure

which the witness was prepared to make. It is only where a party is materially or injuriously affected by an infringement of the rules of evidence or by the improper admission or shutting out of testimony that the court feels itself bound to interfere with a verdict which is in other respects unobjectionable: *Willoughby v. Comstock*, 3 Hill's R. 389.

The next—and the most important point presented by the case for consideration—is: as to the admissibility of Osborn, the husband of the woman with whom the defendant was charged to have committed the adultery in question, as a witness to prove the adulterous intercourse, notwithstanding the objection that, if his testimony should tend to fasten the charge upon the defendant, it would, at the same time, implicate his own (the witness's) wife as an adulteress?

The objection to the admissibility of Osborn as a witness does not rest on any supposed or supposable interest in the suit, for neither he nor his wife were parties. Nor does it rest on the ground that his testimony could be used in any collateral action which he might bring against his wife for a divorce or against the defendant, Van Cort, for criminal conversation with her—or that the record of Van Cort's conviction of the adultery in this suit of his wife against him, founded wholly or partially on the testimony of Osborn, would avail the latter as evidence in any such collateral suit or proceeding he might think proper to institute. But, the objection against him, as a witness, is: that the policy of the law forbids that a husband or a wife should ever be allowed to give evidence which may criminate or even tend to criminate each other. This was the rule as laid down in the case of *The King v. Cleverger*, 2 T. R. 263; but when it came under discussion, in one or two subsequent cases, before the same court, it was acknowledged to be too broadly stated and has not been followed to the full extent: 2 Starkie's Ev. 710; 1 Phillipps's Ev. 79, 80. And in Cowen and Hill's notes to Phillipps, 4 vol. 1555, it is remarked, with reference to all the later decisions on the point, that the notion of such testimony being inadmissible from policy seems to be pretty much given up in England: and see further on the subject: *The King v. The Inhabitants of Boothwick*, 2 Barn. & Adolphus, 639 and *The King v. The Inhabitants*

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of all Saints, Worcester, 6 Maule & Selwyn, 194. And from this last case it will appear that a wife may be received to prove facts going to show the criminality of the husband, provided her testimony, thus given, will not be evidence to affect him in a prosecution afterwards.

It seems to me, however, that it might involve consequences of too serious a character to domestic peace to adopt that as the rule in all cases. But, be that as it may, the present case is not one where the husband was called upon to prove matters which went to criminate the wife. Adultery is not, at common law nor by the statute laws of New York, a criminal offence indictable and punishable as such. And the rule which excludes a husband or a wife from testifying against each other in a suit or action where neither of them is a party or interested in the general result, so as to disqualify them from being sworn as witnesses at all, is: that they may be allowed to prove any fact, provided the evidence they are called on to give does not directly criminate the other or lead to a criminal charge and the arrest or apprehension of the other: 2 Starkie, 709. On an indictment for adultery, where, by the *lex loci*, it is made an indictable offence, the husband of the woman with whom the crime is alleged to have been committed cannot be a witness for the prosecution: *The State v. Garner*, 1 Root, 485; S. P. Wharton's Digest, 265. But that cannot be the rule here, in New York. I must hold, therefore, as did the circuit judge, that Osborn was a competent witness; and that it was admissible for him to testify as he did, although his testimony implicates his wife in the charge of adultery but which was not criminating her in a legal sense and especially as the testimony he gave and the record of the conviction which may follow will not avail him as evidence in any suit or proceeding he may undertake.

One other objection remains to be noticed. After Mrs. Osborn had been examined as a witness on the part of the defendant and had been cross examined, some other witnesses were asked as to her conversations and declarations which they had heard her make touching some of the matters she had testified about and which were pertinent to the issue, involving as they did, not only the defendant's con-

duct but her own. This sort of evidence was the subject of an exception on the trial. It seems to me, however, that there was nothing improper in it; and I believe that no rule of evidence was violated by permitting such inquiries to be made. Mrs. Osborn's conduct had been the subject of inquiry and remark throughout the trial, as well as the defendant's—and necessarily so. It was a part of the *res gesta*.
New trial denied.

1845.

GARR
v.
OGDEN.

GARR, administrator, &c. v. OGDEN and others.

Where an order *pro confesso* is set aside as to non-resident defendants by the court—and they have time “to answer,” they may interpose a demurrer within the time so allowed. It places them in the same situation as a defendant who is under the usual order to answer in forty days.

THE bill had been taken as confessed, on an advertisement against the defendants as non-residents; but, on motion of counsel, the order *pro confesso* was set aside and the defendants were allowed leave “to put in their answer to the said bill within thirty days from the making of the order aforesaid, on payment of costs.” The defendants, then, put in a general demurrer. Motion made to take it off the files. The costs had been paid.

Jan. 13,
1845.

Practice.
Demurrer,
after time
to non-resi-
dent defen-
dant to
answer.

Mr. Garr, for the complainant.

Mr. Henry P. Edwards, for the defendants.

THE VICE-CHANCELLOR:—This is not the case of an extension of the order to answer and therefore governed by the practice under the 125th rule. The defendants had been proceeded against as non-residents; and, on not appearing, the bill was taken *pro confesso*. They then applied to be let in so as to make their defence. Their notice of
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• motion was, that their default and the order taking the bill as confessed should be set aside and that they have leave to come in and defend the suit, &c. And the motion was granted by setting aside the order *pro confesso* and giving them leave, within thirty days, to put in their answer to the bill. This order to answer in thirty days is analogous to an order of course which may be entered in accordance with the appearance that a defendant answer the bill in forty days, &c. Such an order is peremptory, in terms, for it directs that the defendant put in his answer or that the bill be taken as confessed or that an attachment issue (when a discovery is necessary); and yet, notwithstanding the threat of an attachment for not answering, the defendant may plead or may demur to the whole bill, without incurring a contempt of the court. The present thirty days order granted on motion, is, in effect, to take the place of an order of course under the 24th rule; and the defendants were, therefore, at liberty to demur, as they have done.

The motion to take the demurrer off the files must be denied; but, as this is a point of practice about which solicitors might very honestly differ, I shall leave each party to bear his and their own costs of the motion.

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1845.

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 COWMAN
 v.
 KINGSLEY.

COWMAN v. KINGSLEY and others.

A defendant at law interposed usury and affirmed an affidavit to his pleas, with a seeming view to examine the plaintiff under the statute, but such affidavit was not deemed sufficient to meet the views of the act: and a verdict and judgment were had against him: *Held*, that he was too late to come into this court for relief.

This court will not interfere with a judgment at law, where a bill of discovery could have been filed, on the ground that the defendant therein can now (on account of a discharge under the bankrupt act) have the use of his co-defendant as a witness to prove his case.

DEMURRER interposed by the defendants Daniel C. Kingsland and Ambrose C. Kingsland.

Jan. 16,
 1845.

The complainant, Augustus T. Cowman, had come into this court, by his bill, after an unsuccessful defence of usury in the supreme court against certain bonds founded on a loan. The facts at law will be found in the case of *Kingsland v. Cowman*, 5 Hill's Rep. 608. It will be seen there that the complainant (defendant at law) was not allowed to examine the plaintiffs to prove the usury set forth in the notice annexed to his pleas, for the reason that the truth of such notice was not sworn to in positive terms; and that a verdict was rendered against him and his co-defendant Eccles Gillender for eight thousand dollars of debt, besides damages and costs. The complainant had also endorsed a promissory note made by Gillender for payment of interest due on the loan, which had matured and remained unpaid.

Jurisdiction.
Judgment at Law.
Bill of discovery.

After stating all this, the bill went on to show that judgment had been perfected on the verdict and an execution had been issued and a large amount of real estate levied on; that the said co-defendant at law, Eccles Gillender, who had a full knowledge of the charges of usury, had now taken the benefit of the bankrupt act and he had obtained his discharge and certificate thereunder. That he, the said Gillender, had, since the said trial at law, become, by means of the said discharge and certificate, wholly disinterested in the controversy in the said suit at law and in this bill and was

1845.

 COWMAN
 v.
 KINGSLAND.

a competent witness for the complainant in the present suit and that the said complainant could now prove, by the said Gillender, his defence of usury to the said bonds. *Prayer*, that the said defendants Daniel C. Kingsland and Ambrose C. Kingsland might be decreed to cancel and discharge the judgment at law and repay whatever the complainant might have heretofore paid on account of the loan or for costs, &c. The complainant waived an answer under oath.

Mr. *L. B. Woodruff* for the defendants, in support of the demurrer.

Mr. *Lord*, for the complainant.

Jan. 12,
 1846.

THE VICE-CHANCELLOR.—The bill contains enough upon its face to affect the bonds, on which the judgment has been recovered, with usury. But the question is, whether the complainant is not too late in seeking relief in this court after trial and judgment against him at law in the action on the bonds?

It is the principal ground of the demurrer that the complainants, having failed at law with a defence which was a legal and available one there, cannot seek relief in this court on the same ground.

In *Norton v. Woods*, 5 Paige's C. R. 251, S. C. on appeal, 22 Wend. 520, the chancellor has laid down the doctrine, from a number of former cases in this court and in the English chancery, that a party, having a legal defence, must avail himself of it in a suit at law—even by the filing of a bill of discovery for evidence, if he cannot avail himself of facts in any other way. If he omits to do so and does not render a satisfactory excuse for not resorting to such a bill in the first instance, the court will not relieve him from the consequences of his neglect or omission after a judgment has been obtained.

In the case of *Norton v. Woods*, supra, it appeared that the complainant had been deprived of the testimony of the only person who knew the facts, by his being a party plaintiff in the suit at law and, therefore, not admissible as a witness, although otherwise disinterested; and, moreover, a bill of

discovery would have availed nothing. Hence the propriety, in that case, of a resort to the court of chancery after judgment for relief. But the case in hand is different. Here, a bill of discovery, in the first instance, would have been available. The facts were within the knowledge of the plaintiff in the court of law and might have been obtained preparatory to a trial. It is true, that another mode of obtaining a discovery of usury is authorized by the statute, namely, of putting the plaintiff upon the stand as a witness. This, the complainant attempted to do; but it failed—either because he could not or did not make the necessary and proper affidavit to entitle him to put the plaintiff on the stand as a witness. If he could not make a sufficient affidavit for that purpose, he must be supposed to have known, beforehand, that he could not; and that being so, he should have resorted to his bill of discovery. If he could have made the proper affidavit and did not, it was his own folly or negligence; and the omission in such a case presents no ground of excuse. It is true that the complainant has, now, in this court, a competent witness in Gillender to prove the usury, whose testimony he could not have had on the trial at law; and, therefore, he waives a discovery from the defendants in this bill. But the competency of Gillender, as a witness now, does not excuse the omission of not filing a bill of discovery before the trial.

I find no precedent for granting a new trial because a person has become competent to prove facts constituting a defence since the trial, when the party could have had the benefit of the same facts upon a bill of discovery before the trial.

The case of *McIntire v. Mancius*, 16 J. R., 592, has been mentioned; but it is not an analogous case; and *Cowman v. Lovett* (M. S. opinion of V. C. Nov. 6, 1843), which has been referred to, was a case of a bill filed for discovery before a trial at law; and, in that respect, different from the present.

There may be a very great hardship in leaving this complainant liable to pay the judgment; but I do not see that there is any help for him.

With respect to the promissory note spoken of in the bill

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COWMAN  
v.  
KINGSLAND.



1845.

WILKES  
v.  
WILKES.

and prayed to be surrendered and cancelled, the complainant stands in no need of the aid of this court. The note is past due and if ever an action is brought on it, he can now make a good defence at law.

*Order*, that the demurrer be allowed; and bill dismissed, with costs.

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WILKES v. WILKES.

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Where a written instrument of a former closed indebtedness remains in adverse hands, but no right of action or claim in equity exists upon it, this court will not require it to be given up. Equity exercises its power to cause written instruments to be delivered up only under special circumstances. A fear of suit is not enough, as testimony could be perpetuated; nor a charge of its affecting credit if shown about, where such credit is not mercantile.

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DEMURRER TO BILL.

Jan. 16.  
1845.

*Pleading.*  
*Bill to deliver up*  
*written instrument.*  
*Demurrer.*  
*Jurisdiction.*

THE complainant, by his bill, showed that in the month of March one thousand eight hundred and thirty-six, he, in conjunction with Henry Wilkes, Horatio Wilkes and Peter Seton Henry, purchased of Samuel B. Schieffelin fifty-one lots of land at Manhattanville for twenty thousand four hundred dollars; and the title was conveyed to the said Horatio Wilkes, to hold one undivided third part thereof in trust for the complainant and the remaining third parts for the said Henry Wilkes, Peter Seton Henry and himself, in equal shares, subject to a mortgage of four thousand five hundred and fifty dollars previously charged upon the same, which was to be assumed by the buyers. That, of the residue of the purchase money, seven thousand six hundred and fifty dollars was secured with interest to the said Schieffelin by the bond and mortgage of the said Horatio Wilkes; that this mortgage debt was distributed so that Henry Wilkes was to pay or be charged with two

thousand five hundred and thirty-three dollars and thirty-three cents, Horatio Wilkes with one thousand nine hundred and six dollars and ninety-one cents, the said Peter Seton Henry with four thousand five hundred and thirty-three dollars and thirty-three cents and the complainant with three thousand two hundred and twenty-six dollars and forty-three cents; and, on payment of their proportions of the said mortgage debt, with interest, they were to be held entitled respectively to their several agreed proportions. That, as to the complainant's one-third of the consideration money (\$6,800) he paid at the time of the purchase and by means of certain conveyances four thousand two hundred dollars, leaving a balance of two thousand six hundred dollars; but, by a private arrangement between the said Horatio Wilkes and the complainant, it was agreed that the latter should assume in addition to the two thousand six hundred dollars, the further sum of six hundred and twenty-six dollars and forty-three cents on account and as other part of the said mortgage debt, by way of making payment of this latter sum to the said Horatio Wilkes, whose portion of the mortgage debt was to be reduced accordingly; and, in this way, it was settled between them that the complainant's portion of the said mortgage debt (\$2000) should be three thousand two hundred and twenty-six dollars and forty-three cents, while the portion of the said debt to be considered due from the said Horatio Wilkes on his own account (\$2533 34) should be one thousand nine hundred and six dollars and ninety-one cents. That it was agreed between them to pass written memorandums of the matter, which was done—the complainant giving the following to the said Horatio Wilkes: "I owe Horatio Wilkes the sum of three thousand two hundred and twenty-six dollars and forty-three cents, (\$3,226 43,) with interest from the 12th March last, being on account of the purchase of one-third interest in 51 lots at Manhattanville, bought of S. B. Schieffelin." (Signed) "Charles Wilkes." That the said paper was in the possession of George Wilkes the defendant. That, at the same time, the said Horatio Wilkes signed a paper, as follows: "I hereby declare that Charles Wilkes is entitled to one-third of the 51 lots bought by

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"me of S. B. Schieffelin at Manhattanville, on his paying the sum of \$3226 43, with interest at 6 per cent. from 12th March last, being part or parcel of the mortgage now on the above named property." (Signed) "Horatio Wilkes." That those paper writings were exchanged. That the first of the said papers was not intended as a due bill in favor of Horatio, nor as an absolute evidence of debts, but was made simply to express the amount which the complainant was to contribute in the matter. That, on the eighteenth day of November one thousand eight hundred and thirty-six, the said Horatio Wilkes, by indenture of that date, conveyed to Henry Wilkes the said fifty-one lots for the expressed consideration of twenty-five thousand dollars, subject to the payment of the two aforesaid mortgages. That the said Horatio Wilkes never paid the complainant's portion of the said mortgage or any part thereof. That a principal reason for the making of such conveyance was the then insolvency of the said Horatio Wilkes. That the latter, also, made an assignment to William A. Johnson for the benefit of his creditors. That such assignee, by deed of release and for the expressed consideration of four thousand six hundred dollars, quit claimed to the said Henry Wilkes all his right, as assignee, to the said fifty-one lots. That the mortgage for four thousand five hundred and fifty dollars before mentioned (being the first mortgage charged on the said premises) was made by the said Samuel B. Schieffelin to one Effingham Schieffelin; that the second was the mortgage executed by the said Horatio Wilkes to the said Samuel B. Schieffelin and was originally accompanied with a guarantee on the part of the said Henry Wilkes for payment thereof, the same being endorsed on the mortgage; and the said mortgage coming, by assignment, into the hands of one Richard L. Schieffelin and the said Horatio Wilkes failing to pay, a suit of foreclosure was commenced in which the said Henry (on the strength of his guaranty) was made a party; but the said Henry Wilkes to relieve himself for the present, arranged with the said Richard L. Schieffelin to pay off and did pay off the prior mortgage of four thousand five hundred and fifty dollars and it was cancelled and given up to him. But, after-

wards, a decree for sale was had by the said Richard L. Schieffelin as well against the said Henry Wilkes as others and a sale thereunder took place and the lots were struck off at one thousand two hundred and sixty dollars, leaving a large deficiency to be paid by the said Henry Wilkes, under his guarantee and which was paid by him, so that he paid the whole of the mortgages (embracing the amount mentioned in the complainant's due bill or memorandum) save what the premises were sold for. That Horatio Wilkes, in fraud, endorsed over such due bill or memorandum to the defendant George Wilkes, who now pretended to be the owner. That Horatio Wilkes died intestate; and administration was granted to the said George Wilkes. That, afterwards, an action was brought in the superior court of the city of New York by George Wilkes, as administrator, &c. on the said due bill or memorandum as an absolute evidence of debt; that the action, though at issue, had never been tried; that the matter of such due bill or memorandum was, then, fully explained to the said George Wilkes, who, thereupon, came to an arrangement with the complainant to drop the said suit entirely, provided no costs were claimed; and that all this was consummated. And the complainant averred that he acted in such arrangement under the impression and with the full belief that all controversy on the subject of the said memorandum was thereby brought to an end; and that the same was to be given up. But that the said George Wilkes now distinctly averred he intends to hold the same against the complainant for the future and to use the same as circumstances should enable him to with success; and that he pretended that, not having agreed with the complainant, in terms, for the delivery thereof, he had a right to retain possession of the said paper, to show to third parties and to make such other use of the same thereafter as, by the death of witnesses or otherwise, he might, with the hope of success. And the complainant expressly charged that it was the intention of the said George Wilkes to exhibit the said paper to the prejudice of the complainant's credit and, also, to bring another suit thereafter against him on the same, provided the death of witnesses by whom the complainant could now prove the facts of the case should,

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at any future period, seem to him to favor his so doing.

*Prayer* : That the said memorandum be delivered up ; and for further relief.

The demurrer now came up for argument.

*J. P. Hall*, for defendant in support of the demurrer.

*H. W. Warner*, contra.

*Dec. 23.*

**THE VICE-CHANCELLOR** :—The object of this bill is to have the memorandum or certificate given the complainant to Horatio Wilkes and now held by the defendant as his administrator delivered up to be cancelled—no other relief is asked.

It is clear, from the statements in the bill, that no right of action at law or claim in equity can exist upon this instrument in favor of Horatio or his representatives against the complainant. An action at law was once brought and discontinued ; and it is not probable another experiment of that sort will be made. And, yet, it by no means follows that the complainant is entitled to have the paper delivered up : for it may be important—at least of some use to the defendant to hold and be able to produce in case there should, hereafter, be an overhauling of the transaction by the complainant or a claim set up by him for an account.

That this court possesses a jurisdiction to cause written instruments to be delivered up is very certain. But it will be exercised only under special circumstances : See *Hamilton v. Cummings*, 1 J. C. R. 517.

Here, the complainant alleges his belief that the defendant intends to harrass him with another suit at law after witnesses are dead, &c.—not that the defendant has ever threatened him with another. But, to obviate this danger, the complainant can perpetuate testimony. He is apprehensive, moreover, that the defendant will injure his credit by showing this paper as an evidence of debt against him. It is only a mercantile credit that could be injured in this way ; and, yet, the bill does not allege a case of mercantile or any other credit which is liable to be injured.

The demurrer is well taken ; and must be allowed, with costs.

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CURTIS and others, Trustees, &c. v. BALLAGH and another,  
Infants, &c.

Where it is very doubtful whether executors have power to make a mortgage under which there has been a foreclosure sale and enrolled decree and the testator, making the will, left infant children who had appeared by a guardian *ad litem*, but the latter had only put in a general answer and had not raised any defence and the purchaser of the property refused to take, fearing the children's rights: *The court* allowed the decree to be opened and decrees vacated, with leave for the infants (one of whom had come of age) to put in a new answer to set up the defence of the invalidity of the mortgage.

PETITION to open enrolment and to vacate the decrees. The petition stated that the bill in the cause was filed against the petitioners and the rest of the defendant son the twentieth day of June one thousand eight hundred and forty-two, for the foreclosure of a mortgage alleged to have been executed by Hannahrietta C. Ballagh, George D. Strong, William Ballagh, John S. McKibbin and Oliver Woodruff, executrix and executors of James Ballagh, deceased, the father of the petitioners, and prayed a sale of the mortgaged premises in the usual form. That the complainants petitioned to have a guardian *ad litem* appointed for them; and, on the twenty-eighth day of October one thousand eight hundred and forty-two, an order *nisi* for that purpose was entered. That, on the ninth day of November in the said last mentioned year, G. J. McC. was, by the order of this court, appointed guardian *ad litem* of the petitioners, who were both, then, infants. That the answer of the petitioners was filed by the said guardian *ad litem* on the twenty-eighth day of December in the said last mentioned year, but that the said answer was general and in the usual form and contained no statement of the right, title, claim or interest of your petitioners in the lands and tenements embraced in the said mortgage, nor any statement of any specific defence whatever. That the bill of complaint having been taken as confessed against all the other defendants, except Rebecca Ballagh, wife of the petitioner William D.

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*Practice.  
Decree;  
and, open-  
ing decrees.  
Infant.  
Mortgage.*

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Ballagh, an order of reference to one of the masters of this court to compute the amount due on the said mortgage and the bond accompanying it and to take proof of the facts stated in the bill of complaint was made and entered in the said cause on the eighth day of February one thousand eight hundred and forty-three; and the report of the said master, in obedience thereto, was made on the fifteenth day of the said month of February, showing an alleged balance due on the said mortgage of fifteen thousand one hundred and fifty-three dollars and seventy-six cents. That the bill of complaint was dismissed, as against the above named Rebecca Ballagh, by an order made on the fifth day of January one thousand eight hundred and forty-three; and a decree of foreclosure against the petitioners and the other defendants and for the sale of the mortgaged premises was made and entered on the twenty-eighth day of October in the year last aforesaid. "The petitioners further show that pursuant to the said decree, the said mortgaged premises were, on the sixth day of November last, put up and sold under the direction of one of the masters of this court and the same were, then, struck down and sold to James M. Waterbury for the price or sum of four thousand dollars, &c. That no deed of the said premises so sold has been, as yet, executed and delivered to the said James M. Waterbury, nor has the said James M. Waterbury paid the purchase monies, except the ten per cent payable by the terms of sale, but the said James M. Waterbury has declined to pay the same and to complete the said purchase on the ground of a defect of title. The petitioners further show that the said decree was absolute against the petitioners and allowed them no day to show cause against it, if they should be so advised, after arriving at the age of twenty-one years respectively. The petitioners further show that the decree is fraudulent as against them. That the bill does not show or allege that the property embraced in the said alleged mortgage was the property of James Ballagh, the father of the petitioners or that it was mortgaged as such by his executors and executrix—nor does the said bill show or allege that the petitioners were the children and heirs at law of the said James Ballagh or what was the

"nature or character of the title and interest of the petitioners in the mortgaged premises which the bill prayed might be foreclosed, nor do any of the pleadings in the cause show what was the interest of the petitioners in the mortgaged premises, nor was any evidence produced before the master in chancery or in this cause to show the interest of the petitioners in the said mortgaged premises, nor was any evidence produced or given to show any authority in the said executors and executrix of the said James Ballagh to execute the said mortgage. The petitioners further show that the said James Ballagh, their father, was seized in his demesne as of fee and in possession of the property embraced in the said alleged mortgage at the time of his death ; and that, being so seized and possessed, he made and executed his last will and testament of which they have annexed hereunto a copy, &c. The petitioners further show that the execution of the said mortgage was procured by the said George D. Strong, one of the executors of James Ballagh and one of the defendants in this cause to himself by fraud and in direct breach of his trust as executor and trustee under the last will and testament of the said James Ballagh to cover and secure an alleged debt due to him, the said George D. Strong, either personally or as executor. The petitioners further show that they are advised that there is no power contained in the said last will and testament of the said James Ballagh, authorizing the execution of the said mortgage by his executors and executrix ; and that the said mortgage is void, both at law and in equity, against your petitioners. They further show that the said the guardian *ad litem* of the petitioners was ignorant of and altogether unacquainted with the title and rights of the petitioners in the premises embraced in the said alleged mortgage ; and, therefore, no defence setting forth their title and rights was made by him in the answer filed for the petitioners—nor was there any evidence offered or produced by him to establish the rights of the petitioners and the validity of the said mortgage. The petitioners further show that by reason of the said mortgage being void, both at law and in equity, the petitioners are advised that they have a full and ample defence against the said bill and that no

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"decree ought to have been rendered against them or either of them, nor for the sale of the said mortgaged premises. They further show that the petitioner, William D. Ballagh, arrived at the age of twenty-one years on the second day of May last; and that the petitioner, Thomas D. Ballagh, is still an infant. And they further show that George S. Ballagh, a brother of your petitioners and named in the said last will and testament of their said father, died on the third day of June one thousand eight hundred and forty-two intestate and unmarried, he being, then, an infant about sixteen years old; and that the petitioners are the only heirs at law of the said James Ballagh, deceased.

They, therefore, pray that the enrolment of the said decree may be opened; the decree and the order for reference to the master and his report thereon set aside; and that they be at liberty to file a further and better answer to the said bill of complaint or for such other and further order in the premises as may seem meet and proper and as may be necessary to enable them to protect their rights in the premises."

Mr. *Bayard*, for the petitioners.

Mr. *D. Marvin* and Mr. *Noyes*, contra.

Mr. *Crapo*, for the purchaser Waterbury.

Mr. *Bonney*, for a special receiver.

*March.*

THE VICE-CHANCELLOR:—It is not probable that the petitioners can ever derive any benefit from the property covered by the mortgage in question, even though it should be found not to affect their title or interest as remaindermen under the will of their father: it appearing from the affidavits and papers read in opposition that the debts of the father and the support the children have had since his death have more than absorbed the whole estate. Still, that is not properly the question at this time. The point is, whether this mortgage can be used to extinguish their title as devisees?

The executors had no right to mortgage the real estate, unless by some power or authority conferred on them by the will. There is a power to convert into money portions of the real estate, in order to make up a deficiency of the income for the support of the wife and children. So, there is a power to dispose of the real estate for the purpose of investing the proceeds in other securities for their benefit. But it is very questionable, whether the giving of this mortgage can be considered as within either of those powers? and, under the circumstances, these petitioners ought to have the opportunity of being heard on that point.

Although the guardian *ad litem* might and ought to have raised the point, had he been aware of the facts, yet, he has not done so. It is not, however, too late for these parties to be let in to make a defence, by an opening of the enrolment and setting aside the decree: *Millsbaugh v. McBride*, 7 Paige's C. R. 509; *Tripp v. Vincent*, 8 Ib. 176.

This course seems to be the more necessary and proper in order to insure a good title to a purchaser against these children and devisees. Under the present decree and the master's sale which has been made, the purchaser objects to the title: having had notice that these petitioners meant to contest the validity of the mortgage; and until there is a decision on the merits in relation to the mortgage, I consider that the court would not compel the purchaser to take.

Ordered, that the enrolment be opened and the decree vacated; and that the petitioners have leave to answer *de novo*, setting up the defence of the invalidity of the mortgage as against them and that the master refund the purchase money paid by the purchaser. Costs to abide the event.

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## BRUEN v. BRUEN and another.

Where a demurrer, put in with an answer, is not restrictive in its heading, it is bad: therefore where the caption was: "The demurrer and answer of G. W. B. and J. B. B., defendants to the bill, &c." held bad in form.

An answer overrules a demurrer when the defendant does not restrict his answering to the parts not covered by it. Thus, it is done where the defendant commences paragraphs with "And this defendant further answering the said bill of complaint says, &c."

Where a bill is filed in relation to alleged frauds in a particular matter, the complainant may charge contemporaneous frauds by the defendant in which the complainant has no interest; and this has to be answered. A demurrer will not hold to it.

Jan. 23,  
1845.

*Pleading.*  
*Demurrer.*  
*Answer.*

BILL filed by Mrs. Mary Ann D. Bruen against George W. Bruen and John B. Beck. It showed that the defendant George W. Bruen had been her agent in regard to real estate for years; various alleged frauds in his accounts were charged; and there was a transaction embracing a lot which it was said he held secretly in the name of Richard S. Williams and which he got conveyed to the complainant and afterwards while she was out of the country allowed to be foreclosed and bought under the name of the defendant John B. Beck although with the defendant Bruen's money and for his benefit. The complainant claimed to be still the equitable owner of this lot. Besides the clauses in the bill relating directly to the complainant's rights and to the defendant Bruen's conduct towards her, there were the following general allegations: "that she has been informed and believes it true and so states that the said George W. Bruen caused divers other lots of ground and property of great value to be conveyed at his own expense and for his own benefit to the said John B. Beck as also to the said Richard S. Williams at or about the period of the said George W. Bruen's becoming ostensibly insolvent as aforesaid and for the like sinister purpose of covering the same from his creditors; and your oratrix craves a full discovery from the said John B. Beck in this behalf so far as he is concerned

and can state with time and place and other specifications in detail, your oratrix believing and charging that the said John B. Beck acted collusively with the said George W. Bruen in the various transactions here referred to as connected with his name to be used to coin various interests for the said George W. Bruen or otherwise in his behalf.

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BECK.

And your oratrix further understands and believes and therefore states that the said George W. Bruen, with the like fraudulent design as aforesaid, transacted a great variety of business in other names than his own and concealed a vast amount of property from his creditors by so doing that as surviving partner of the late firm of Thomas H. Smith & Son, he had divers funds and resources of that firm under his control and drew from thence the means of numerous instruments on his own account, covering the same from the pursuit of his creditors by the continuance of false names as above mentioned. And that he lately admitted to your oratrix or in her presence as showing that he has been in the habit since his pretended failure as aforesaid of transacting his business under false names and for the very reason that his circumstances were so involved as to require it in order to elude his creditors or to that effect, of which admissions your oratrix as she believes is able to make proof."

The defendants put in a joint demurrer and answer. The demurrer expressly covered those parts of the bill which we have above extracted—insisting that the complainant had no interest in the matters embraced thereby. The pleading was headed: "The demurrer and answer of George W. Bruen and John B. Beck, defendants to the bill of complaint of Mary Ann D. Bruen, complainant." There were paragraphs of the answer which commenced thus: "And this defendant George W. Bruen further answering the said bill of complaint says, &c." "And this defendant George W. Bruen further answering says, in bar to the said bill of complaint or so much thereof as seeks to have an account from this defendant (the taking of which said account would be attended with great expense and loss of time to this defendant, that this defendant being a resident of Hudson county, state of New Jersey, &c.," (going to show his discharge under the bankrupt act.) "And this defendant John B.

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"Beck expressly denies that he, in any way, colluded with the said George W. Bruen or any other person in relation to the said sale or conveyance to him." "And this defendant John B. Beck further answering so much of the said bill of complaint as is not above demurred to denies all combination or confederacy against the said complainant, &c."

The case came before the court on the demurrer.

Mr. *Ellingwood*, in support of it.

Mr. *H. W. Warner*, contra.

Dec. 23,  
1845.

THE VICE-CHANCELLOR:—I am inclined to think this demurrer is bad in form. The caption does not specify that it is the demurrer to a part and answer to the residue of the bill—but it is general: "The demurrer and answer of the defendants to the bill?" thus importing to be a demurrer as well as an answer to the whole bill.

It goes on to particularize, however, the parts of the bill to which the demurrer applies; and this, possibly, may be sufficient to obviate the objection to form in the caption.

But it is bad in other respects. The answer, in various places, is made to override the demurrer in its general language. For instance: "And this defendant George W. Bruen further answering the said bill of complaint says;" and where the defendant Bruen sets up his discharge in bankruptcy, in bar to the said bill, &c. he words it "in bar to the said bill of complaint or so much thereof, &c." As to the defendant Beck, the part of the bill demurred to charges him with collusion in lending his name, &c.; and yet, at folio 66 of the answer, he denies that he in any way colluded, &c.

But, whether or not the demurrer is bad in form or is overruled by the answer, I am of opinion that the matter demurred to is not an immaterial part of the case made by the bill. It is matter that may properly be alleged and to which evidence may be adduced, as is clearly established by the supreme court in *Cary v. Hotailing* and *Olmsted v. Hotailing*, 1 Hill's R. 311 and 317.

The demurrer must be overruled, with costs; and the defendants have twenty days to answer the part of the bill to which the demurrer applies.

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FRANCIS A. PALMER v. ELLIOTT and others.

JAMES R. PALMER v. ELLIOTT and others.

Although a complainant filing a bill of interpleader ordinarily gets his costs, yet where he leaves unprotected (by not making him a party) one who should have been primarily protected, *e. g.* his accommodation endorser, and compels the filing of another bill, he will not be allowed his costs.

BILLS OF INTERPLEADER.

THE complainant in the first above mentioned suit had made two accommodation promissory notes for the respective sums of two hundred dollars payable to the order of the complainant in the second suit, James R. Palmer. Separate actions had been commenced on the notes in the supreme court against maker and endorser by John Elliott. An attaching process had been commenced against the estate of one Thomas Faulkner, and they claimed the said notes.

Feb. 7,  
1845.

Interpleader.  
Costs.

The complainant Francis A. Palmer (the drawee of the promissory notes) filed a bill of interpleader, making Elliott and the trustees parties, but not including his endorser James R. Palmer (the complainant in the other suit) as a party; and he paid money into court. James R. Palmer—against whom the actions were continued to be pressed—then filed a bill, stating the above facts; alleging his apprehension of the insolvency of the maker of the notes; and praying an injunction upon the judgments at law which had been obtained against him.

By a consent, both causes were to be heard together.

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Mr. *Morris*, for the complainant Francis A. Palmer.

Mr. *Scoles*, for the complainant James R. Palmer.

Mr. *Judah*, for the defendant Elliott.

Mr. *J. Smith*, for the trustees.

March 10,  
1846.

THE VICE-CHANCELLOR:—These causes are brought to a hearing together upon the pleadings—no proofs having, as yet, been taken to show which of the defendants have title to the promissory notes.

The question first in order is upon the bill of Francis A. Palmer: what disposition ought to be made of it? As between him and the parties defendant, it is properly a bill of interpleader. Neither of them have demurred nor objected, in their answers, that he had no right to call upon them to interplead and settle the question between themselves as to which had title to these promissory notes. He paid into court four hundred and forty dollars, that sum being deemed sufficient, at the time, to cover the amount due on the notes and the costs of the suit at law, so that he is entitled to a decree discharging him from all further liability to each and every of the defendants in respect to the two promissory notes and directing them to interplead, &c. in relation to the fund.

But is the complainant Francis A. Palmer entitled to the costs of his bill in this court?

As a general rule, a party filing a proper bill of interpleader in a proper case is entitled to be paid his costs out of the fund or property in dispute. There are special circumstances, however, in this case, which, I consider, deprive him of his right to costs. As maker of the promissory notes, he was bound to protect his endorser James R. Palmer—who endorsed as a mere surety—as well as himself. He omitted to do so. His excuse is, that James R. Palmer refused to unite with him as a complainant in the bill. True—but he should, nevertheless, have made him a party defendant, alleging such refusal; and have asked an injunction to stay the proceedings at law against them both. In

consequence of his not taking that course, the actions went on against James R. Palmer, the endorser, and, after judgments and executions against him, he is driven to the necessity of filing a bill of the same character for his own protection. Now, it is unreasonable to charge the fund with the costs of more than one suit for the purpose of effecting an interpleader; and as James R. Palmer is entitled to favor and protection in equity, as far as is compatible with the rights of the creditors, and as it was the duty of Francis A. Palmer to have sought that protection for him in the first instance, he must submit to forego his claim to costs out of the fund and allow James R. Palmer to have his costs of the suit on the bill filed by him as a bill of interpleader to be paid out of the money as usual in such cases.

The proceedings in this court, on these bills, are not sufficiently matured—no proof having been taken to enable the court to decide upon the ownership of the notes as claimed in behalf of Elliott the infant on the one hand and of the trustees of Faulkner on the other.

There must be the usual decree, entitled in both causes, adjudging the respective bills to be well filed as constituting one bill of interpleader; but that Francis A. Palmer bear his own costs of the said suits and be discharged from any further claim on the two promissory notes. And that, on James R. Palmer paying to the attorney of Elliott, in the suits at law, the taxed costs of these suits as included in the judgments and the sheriff's fees on the executions out against him at the time he filed his bill, that then he be paid the costs of his suit in this court to be taxed out of the money brought in and deposited by Francis A. Palmer as being the amount of the two promissory notes in question. And that it be referred to a master to take proof of the titles of the respective claimants to the promissory notes; and to ascertain and report to which of them the money paid on the notes belongs. And all further directions, in relation to the money and in regard to the matter of costs of the bill of interpleader and of the reference and subsequent proceedings as to which of the adverse claimants shall be charged therewith, are reserved.

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 v.  
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 RADCLIFF and others v. ROWLEY and others.  
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Radcliff, in 1812, bought and had land conveyed to him by Van Benthuyssen and gave a mortgage back; but did not know of two judgments against the latter. On the 31st January 1831, the attorney of Van Benthuyssen sold the land under the power in the mortgage without any notice, request or demand and on the usual advertisement; and bought in his own name. Radcliff, hearing of the sale, went to Van Benthuyssen, who consented to waive the sale or to allow full value on a settlement. The attorney, by pretence, strengthened his title by a deed of the power of sale from Van Benthuyssen; and, at last, insisted on ownership. Soon after the sale, the attorney obtained control of the two judgments and sold the land and again bought in his own name, without notice or knowledge of Radcliff; but the attorney, as well as Van Benthuyssen, afterwards declared that no advantage thereby should be had against Radcliff. In 1834 a bill was filed by Van Benthuyssen against the attorney, which resulted in a decree and order against the attorney requiring him to convey to Van B., but giving him a lien for any balance due to him. He conveyed on the 17th day of January, 1839. Radcliff had gone into possession from the first and so continued until his death in 1842; and his heirs, the complainants, had followed up such possession. But, now, the attorney proceeded under the aforesaid decree and order to sell for balance and alleged to be due from Van Benthuyssen (who was also dead) and the attorney had also put a mortgage on the property: *Held*, on a bill filed by the said heirs of Radcliff to be quieted in possession—to which a demurrer was interposed by the attorney—that an equity had arisen on the original purchase and covenants whereby Radcliff was entitled to be protected against the legal title conveyed by the attorney (under the decree) to Van Benthuyssen; and that this equity arose at the time of the said decree of the 17th of January 1839, and as six years had not transpired since then, that the statute of limitations did not apply.

Feb. 7,  
 1845.

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*Vendor  
 and pur-  
 chaser.  
 Fraud.  
 Attorney  
 and client.  
 Clouds on  
 title.  
 Statute of  
 limita-  
 tions.*

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 DEMURRER TO BILL.  
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THE bill showed that, on the twenty-third day of October in the year one thousand eight hundred and twelve, William Radcliff purchased of Garrit Van Benthuyssen the western half of lot No. 4, &c. in the town of Edmeston, County of Otsego, containing five hundred and twenty acres for four thousand three hundred and forty-three dollars. Deed given, with full covenants. Radcliff gave a mortgage for seventeen hundred dollars of the purchase money on the westerly half of the tract, namely, on two hundred and sixty-acres.

Radcliff supposed the premises to be clear of incumbrances; but, in fact, there were two judgments against Van Benthuyssen, one for three hundred and sixty dollars and fifty-five cents and the other for two hundred and ninety-nine dollars and eleven cents. They were both docketed on the first day of March one thousand eight hundred and nine. Radcliff had no notice or knowledge of this until the year one thousand eight hundred and twenty-one, when executions were issued and levies made on the eastern half of the premises containing two hundred and sixty acres, covered by the mortgage. In the year one thousand eight hundred and twenty, the defendant Reuben Rowley attended to the law business of Van Benthuyssen and was his general agent; and so continued until the year one thousand eight hundred and twenty-six. On the twenty-first day of January one thousand eight hundred and twenty-one a sale of the mortgaged premises was made under Reuben Rowley's direction, by virtue of the power in the mortgage. No notice, except the usual advertisement; and Radcliff knew nothing of it until after the sale. No request or demand had been made of him for the money (which the complainants denied was due) although Radcliff resided in the adjoining town to Van Benthuyssen. No competition at the sale. Rowley bought in the property for forty-four dollars, giving out that it was for the benefit of Van Benthuyssen. The premises were worth the whole seventeen hundred dollars. Rowley, then, pretended that the purchase was for Van Benthuyssen and when Radcliff heard of the sale, he called on Rowley, who told him he had bought in as agent for Van Benthuyssen; and Radcliff called on the latter, who told him the sale should be waived or the full value should be allowed or accounted for to him on a final settlement. Consequently, Radcliff took no steps to set the sale aside. Nevertheless, Rowley intended, all the while, to keep the property as his own, concealing from both Van Benthuyssen and Radcliff his fraudulent intention. Under pretence of forms of law, he obtained from Van Benthuyssen a deed under the power of sale dated the twenty-seventh day of January one thousand eight hundred and twenty-one—continuing to represent that he still held

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the property for Van Benthuyssen. But when Radcliff required the latter to come to an arrangement, Rowley, then, claimed that he had made the purchase on his own account and refused to give up to Van Benthuyssen any right therein; and had retained and kept and still held possession thereof. All this referred to the two hundred and sixty acres on the westerly side of the tract. The bill charged that this property, covered by the mortgage, would become lost to Radcliff and to Van Benthuyssen if Rowley were permitted to retain his unjust and fraudulent ownership. In the month of March in the year one thousand eight hundred and twenty-one and shortly after the mortgage sale, Rowley obtained control of the two judgments against Van Benthuyssen, by paying the amounts to Mrs. Banyan's attorney. The payment was made by funds of Van Benthuyssen's in Rowley's hands as his agent. That, with a fraudulent design, both against Van Benthuyssen and Radcliff, he, Rowley, obtained assignments of the judgments to himself; and, thereupon, issued executions and sold the easterly half of the tract. That this was done without notice to Radcliff, was irregular, without *scire facies* and by prevailing on Van Benthuyssen to admit the judgments to be due and that, in this, Rowley deceived and misled Van Benthuyssen as to his real design. That Van Benthuyssen had abundance of property in Dutchess County and elsewhere, which should have been first taken. That the sale of the easterly two hundred and sixty acres of the westerly half of lot No. 4, was made by the sheriff on the fourth of April one thousand eight hundred and twenty-one and was bought in by Rowley's agent at three hundred and eighty-five dollars. That when Radcliff heard of the sale he believed it to be so grossly irregular and iniquitous that it would not be persisted in; and he did not take prompt measures for relief. That negotiations were had with Van Benthuyssen, who admitted that the sale and purchase by Rowley was by his (Van Benthuyssen's) consent and for his benefit, but promised to take no advantage of Radcliff. That Rowley made similar admissions. But, about the time to redeem (say, about July one thousand eight hundred and twenty-two) and when it was too late for Radcliff

to avail himself of that right, Rowley, for the first time, gave out that his purchase was for himself and independent of Van Benthuyzen ; and succeeded in persuading Van Benthuyzen to accede thereto, &c. That, by artful management, Radcliff lost the opportunity to redeem. That he, then, made application to the supreme court to vacate the sale, on the ground of irregularities, but these were adjudged to be insufficient or relief by motion inappropriate ; and the application was denied. That, in the month of October one thousand eight hundred and twenty-two, Radcliff filed a bill in chancery against Rowley and Van Benthuyzen. That an answer was put in, in the name of the latter, so at variance with the bill that the remedy of Radcliff appeared involved in so much doubt, he allowed his bill to be dismissed for want of prosecution. But, afterwards, Van Benthuyzen acknowledged and the complainants, Radcliff's heirs, could now prove that the answer put in, in the name of Van Benthuyzen, was prepared by Rowley and was falsely read to Van Benthuyzen and was sworn to under a false and erroneous idea of what it contained. That, in the year one thousand eight hundred and thirty-one, a bill was filed by Van Benthuyzen against Rowley ; and a decree had therein on the twenty-fifth day of November one thousand eight hundred and thirty-four to the effect that Van Benthuyzen was the real owner of the lands so as aforesaid sold under the executions ; and that Rowley was but a trustee and he was decreed to convey them to Van Benthuyzen. That, on the seventeenth day of January one thousand eight hundred and thirty-nine, Rowley executed a conveyance thereof to Van Benthuyzen ; but, under an order of the chancellor of the eighth day of January one thousand eight hundred and thirty-nine it was made subject to Rowley's lien for any balance which might be found due to him in the suit. That Radcliff, at the time of his original purchase, went into possession and continued possessed of all that part now in controversy, namely, the part sold under the executions, until he went to South America in the year one thousand eight hundred and twenty-eight ; that he was absent upwards of two years ; and, after his return, he always asserted his right to

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possession and, during several years before his death, did have legal and actual possession and was so possessed at the time of his death ; and the complainants had, as heirs, ever since the possession and then had the possession under the original title of Radcliff and adversely to all claim by Rowley. That, on the third day of July one thousand eight hundred and forty-two, Radcliff died, being then the undisputed owner, as far as that he was not disturbed in the possession, right or use of the premises ; and that the complainants, his said heirs, had, since that time, been undisturbed. But they had recently been informed that Rowley was attempting to revive his claims to the property under some proceedings in the cause between him and Van Benthuyzen subsequent to that decree, by virtue of which he pretended the lands were liable to be sold for the payment of a balance of account decreed in his favor against Van Benthuyzen. That such final decree appeared to have been made on the twenty-fourth day of November one thousand eight hundred and forty, but not enrolled until the fourteenth day of September one thousand eight hundred and forty-two. That Van Benthuyzen died on the fourteenth day of March in the year one thousand eight hundred and forty-one ; but no proceedings had been taken to revive against his representatives. Still, he had advertised a sale, under the decree, of the premises for the seventeenth day of September one thousand eight hundred and forty-four. The complainants insisted that their title could not be invalidated by such proceedings, yet, the value of the property was lessened by bringing their title thus indirectly into dispute and they were entitled to be relieved from the obstruction occasioned by such proceedings of Rowley's to the full enjoyment of their property. That, by the county clerk's certificate recently furnished, there appeared of record a mortgage from Rowley to the defendants Messrs. Craft for the two thousand five hundred dollars, bearing date the fourteenth day of May one thousand eight hundred and thirty-one, open of record and an apparent lien. A charge that the mortgage was not given in good faith, nor for a *bona fide* consideration ; and was intended as a hindrance and embarrassment to the title of William Rad-

cliff. That the Messrs. Crafts refused to cancel it; and kept it on foot to the prejudice of the complainants' title.

*Prayer*: That the complainants' title may be settled by a decree of this court and relieved from the unfounded claims set up by Rowley and the Crafts. That Rowley might be decreed to relinquish and cancel of record all lien upon the premises of the complainants for any balance of account against Van Benthuyssen and be barred from all further proceedings to molest and interfere with the complainants enjoyment of the property; and that the Crafts mortgage might be cancelled. And for further or other relief.

The demurrer was interposed by the defendant Rowley.

Mr. *B. F. Butler*, in support of the demurrer.

Mr. *Dana*, contra.

THE VICE-CHANCELLOR:—The two principal grounds taken by the demurrer are, 1. That there is no equity in the bill; and, 2. That whatever be the equity stated, the relief is barred by the statute of limitations, as more than six years have elapsed since there has been a knowledge of the facts. March 10,  
1846.

The bill tells the story of a series of frauds practiced by Mr. Rowley on his client and principal Van Benthuyssen and on William Radcliff, the ancestor of the complainants. But it claims relief only in respect to that portion of the lands which were sold under the executions on the Banyan judgments in the month of April one thousand eight hundred and twenty-one.

The other portion, sold under the mortgage in the month of January one thousand eight hundred and twenty-one, is not attempted to be reclaimed; and if it were, the statute of limitations would be a bar. So, with respect to the two hundred and sixty acres sold under the executions: for if, by that proceeding, the complainants or their ancestor had been dispossessed of the land and the object of this bill were to set aside the sale and have a restoration of the possession and ownership, there would seem to be either no

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necessity for coming into this court or at this late day the claim to such relief would be barred by the statute.

The bill, however, shows that, notwithstanding the sheriff's sale and the failure to redeem in the year one thousand eight hundred and twenty-two, the ancestor, Radcliff, remained in the undisturbed possession down to the time of his death in the month of July one thousand eight hundred and forty-two. In the meantime, a litigation took place between Rowley and Van Benthuyzen; and, as between them, the latter was adjudged to be the owner, subject to the lien or charge of the former for the balance of his account—and subject to that charge Rowley conveyed to Van Benthuyzen on the seventeenth day of January one thousand eight hundred and thirty-nine. Thus, Van Benthuyzen became vested with the legal title and, as between him and Radcliff, an equity arose that the latter should be protected against that legal title, by reason of Van Benthuyzen's covenants and warranty in his original deed to Radcliff.

It, then, appears that since the death of Radcliff, his heirs, the complainants, have remained in the undisturbed possession of the land; and that Rowley has obtained a decree for the balance due to him from Van Benthuyzen. This decree was made on the twenty-fourth day of November one thousand eight hundred and forty; and was enrolled on the fourteenth day of September one thousand eight hundred and forty-two. Van Benthuyzen died on the fourteenth day of March one thousand eight hundred and forty-one and Rowley is proceeding to a sale of the land under that decree—which was advertised for the seventeenth of September one thousand eight hundred and forty-four. It is alleged that this proceeding of Rowley's and the sale he has advertised operate to the prejudice of the title of the complainants and to their possession and use and enjoyment of the property and they, therefore, claim to be protected in that possession and enjoyment as against Rowley and, also, as against his mortgagees, the Messrs. Crafts.

The bill appears to me to show a strong case for that purpose as against these parties. A case, too, of which chancery has jurisdiction on the ground of removing clouds

from the title of the complainants and obstacles in the way of their full enjoyment of the property, which is an acknowledged head of equity: see *The Mayor, &c. of Brooklyn v. Meserole*, 26 Wend. R. 137.

I am of opinion, also, that this cause of equitable relief may well be considered as having arisen when Rowley undertook or threatened to enforce the decree for his balance against the land in question or that an equity arose to Radcliff to have the land exonerated from all claim of Van Benthuyzen and of Rowley as his creditor the moment Rowley conveyed it to Van Benthuyzen by his deed of the seventeenth day of Jannary one thousand eight hundred and thirty-nine. This was within six years of the time of filing the bill.

The demurrer must be overruled, with costs.

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*It would seem*, that a quarter's salary due to a defendant on a certain day can be secured under a judgment creditor's bill filed on that day, notwithstanding the defendant, a few days before, had filed his petition in bankruptcy. But, however this may be, he, himself, cannot take the point by a plea—it is the province of his assignee.

JUDGMENT CREDITOR'S BILL.

THE defendant was a judge of one of the courts of the city of New York; and the bill was filed on the first day of November one thousand eight hundred and forty-four, on which day a quarter's salary for services as judge became due to the defendant. A few days before (and when, as it will be seen, the salary was not due) the defendant had filed his petition in bankruptcy; and he now set it up by a plea, as follows:

This defendant by protestation not confessing or acknowledging all or any of the matters or things in the said com-

May 28,  
1845.

Debtor and  
Creditor.  
*Judgment  
Creditor's  
Bill.  
Pleadings.  
Plea.  
Bankrupt.*



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plainant's bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, as to all the discovery and relief thereby sought for, from, or prayed against this defendant, this defendant by leave of the court first had and obtained doth plead thereto, and for plea saith, that he, this defendant, before and on the twenty-ninth day of October in the year one thousand eight hundred and forty-two, was and thence continuing until and at the time of the decree of bankruptcy and discharge from his debts as a bankrupt hereinafter mentioned, continually hath been a resident in the city of New York in the southern district of the State of New York, in the second judicial district of the United States of America. And this defendant so being such resident at the time herein first mentioned was owing debts which were not created in consequence of a defalcation as a public officer, or as executor or administrator, guardian or trustee or while acting in any other fiduciary capacity and was unable to meet his debts and engagements and was a bankrupt within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," passed the 19th of August 1841. And this defendant so being such bankrupt as aforesaid, afterwards and after the recovery of the judgment in the complainant's bill of complaint mentioned and after the act of Congress aforesaid went into effect and before the complainant's bill of complaint in this cause was filed, to wit, on the 29th day of October 1842, pursuant to the provisions of said act, did present to and file in the district court of the United States for the said southern district of New York his petition, setting forth, to the best of his knowledge and belief, a list of his creditors, their respective places of residence and the amount due to each, together with an accurate inventory of his property, rights and credits of every name, kind and description and the location and situation of each and every parcel and portion thereof and in said petition did declare himself to be unable to meet his debts and engagements, which said petition was duly verified by the oath of the petitioner, this defendant. And this defendant did apply to the said district court for the benefit of the said act of congress aforesaid (in such case provided)

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by a full discharge from all his debts. And this defendant further, in fact, saith that, upon and after the filing of such petition as aforesaid, due notice thereof and of the intended hearing thereof before the said district court at the city of New York on the first day of December in the year 1842 was published in the Morning Courier and New York Enquirer, the New York Standard and in the New York Commercial Advertiser, three of the public newspapers printed in the said district, (for that purpose designated by the said district court) at least twenty days before such last mentioned day, and that, at such last mentioned day and place, the said petition came on to be heard before the honorable Samuel R. Betts, district judge of the United States for the said southern district of New York. And such proceedings were thereupon had in said court before the said district judge that afterwards, to wit, on the tenth day of December 1842, by the decree of the said district court in that behalf, then and there made upon the said petition and duly entered of record in the same court, according to the provisions of the said act, this defendant was declared to have become and to be a bankrupt within and according to the true intent and meaning of the act of Congress aforesaid, which said decree remains in full force and effect, not reversed, avoided or in any manner vacated or impaired, as by the said decree still remaining of record in the said district court, before the aforesaid judge thereof, may more fully and at large appear. And the defendant in fact further saith that William C. H. Waddell, at the time of the aforesaid decree, was and from thenceforth hath been and now is, by the appointment of the said district court, the official or general assignee in bankruptcy appointed and designated under the rules and regulations of said district court and no special or other assignee was or hath been appointed assignee of the property and rights of property of this defendant. And the said property and rights of property of this defendant of every name and nature, whether real, personal or mixed (except as in the act is provided and excepted) did, by the decree aforesaid, by operation of law, *ipso facto*, from the time of such decree, become divested out of this defendant and the same became vested by force of said decree in the said William C. H. Waddell so

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being the general assignee as aforesaid. And the defendant in fact further saith that, after the making of the decree aforesaid, to wit, on the twenty-first day of November in the year one thousand eight hundred and forty-four, at the city of New York, he, the said defendant, presented to the said district court a petition praying to be discharged in full from all his debts and for a certificate of such discharge, as by the said last mentioned petition now being and remaining of and in the said court, at the city of New York aforesaid, will more fully and at large appear. And this defendant in fact further saith that, after the aforesaid decree and after the presentation of the said last mentioned petition, such further proceedings were had in the said district courts aforesaid at the city of New York, according to the provisions of the act of Congress aforesaid and to the rules and practice of the said district court, that afterwards, to wit, at a district court of the United States of America held for the southern district of New York at the city hall of the city of New York, to wit, on Saturday the 8th day of February in the year 1845, before the Honorable Samuel R. Betts, district judge, the matter of C. D., a bankrupt (being the defendant in this suit) came on to be heard and upon such hearing a decree of the said court was duly made in the matter and of the tenor and effect following, to wit: C. D., of the city of New York, counsellor at law, a bankrupt, having filed a petition praying to be discharged in full from all his debts and for a certificate of such discharge pursuant to the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," passed August 19th, 1841. And it appearing to the court, upon the said petition and the report of the clerk and assignee accompanying the same, that the said bankrupt has *bona fide* surrendered all his property and rights of property (with the exception of such articles as were designated and set apart by the assignee) that the said bankrupt has fully complied with and obeyed all the orders and directions which have from time to time been passed by this court and has otherwise conformed to all the requisites of the said act and that no written dissent to such discharge has been filed by a majority in number and value of his creditors who have proved their debts and no cause

being now shown to the court why the prayer of the petitioner be not granted, it is ordered, decreed and allowed by the court that the said C. D. be and he accordingly hereby is fully discharged of and from all his debts proveable under the said act and owing by him at the time of the presentation of his petition to be declared a bankrupt. And it is further ordered that the clerk duly certify this decree under the seal of this court and deliver the same to the said bankrupt when demanded—which said decree remains in full force and effect, not reversed, avoided or in any manner vacated or impaired, as by the said decree still remaining of record in the said district court before the aforesaid judge thereof as by the certificate thereof under the seal of said court and now in the possession of this defendant ready to be produced as this honorable court shall direct. And the defendant in fact further saith that, before the granting of said discharge and certificate, he, the said defendant, did *bona fide* surrender all his property and rights of property, with the exception of such articles as were designated and set apart by the assignee for the use of the bankrupt according to the provisions of the said act of congress and did fully comply with and obey all orders and directions which were from time to time passed by the said court touching the matters of his said petition and did otherwise conform to all the requisitions of the said act and that no written dissent to the discharge of the said defendant was filed by a majority in number and value of his creditors who have proved their debts and that no cause was shown to the said court why a discharge and the certificate thereof should not be granted although notice to the creditors of the said defendant and other persons in interest to appear and show cause against the granting of the same was duly given pursuant to the said act and the rules and practice of said court.

And this defendant further saith that the judgment recovered by the said complainants and in the said bill of complaint mentioned is and was for and recovered upon a debt contracted by this defendant prior to the presentation of the aforesaid first petition of the said defendant and the said judgment with all moneys due thereon was a debt provable

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under the aforesaid act of Congress and under the decree of bankruptcy aforesaid.

And this defendant further saith that the said bill of complaint of the said complainant was filed and the said suit commenced thereby in the court of chancery, to wit, on the first day of November in the year one thousand eight hundred and forty-two, the day when the quarter's salary of this defendant in the complainant's bill mentioned became due and payable and after the filing of this defendant's petition in bankruptcy as aforesaid. And this defendant doth aver the truth of and doth plead the matters aforesaid in bar of the whole of complainant's said bill of complaint and of and to all relief and discovery thereby sought and he prays the judgment of this honorable court whether he should be compelled to make any further answer to the said bill of complaint; and he prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

The plea now came on for argument.

Mr. *P. S. Crooke*, in support of the plea, cited *Browning v. Bettis*, 8 Paige's C. R. 568; 26 vol. of the London Law Magazine, 350; and *Flarty v. Odum*, 3 Durn. & East, 681.

Mr. *De Witt*, for the complainant.

THE VICE-CHANCELLOR :—The plea in this case is a good plea to show that the defendant is personally exonerated and discharged from the debt and the judgment.

But that is not the question. The question is, whether it is a good plea to exonerate the particular fund or sum of money which it was the object of the bill and injunction in this cause to reach and have applied to the complainant's judgment. By filing the bill on the first day of November, the complainant acquired a lien in equity upon the money. It was a quarter's salary which had then been earned and become due and payable and, as such, was liable to this creditor within the principle recognized in *Browning v. Bettis*; and a judgment creditor, having acquired this equi-

table lien, cannot be divested of it by the debtor's subsequent proceedings in bankruptcy. This point I understand to be conceded by decisions made in the United States Court.<sup>(a)</sup> True, in this case the defendant's petition in bankruptcy was filed two or three days before this bill was filed: but the filing of the petition did not divest the petitioner of his property and right of property. It is "from the time of the decree" declaring him a bankrupt that he is to be deemed divested of his property and the assignee to be vested with it: § 3 of the bankrupt law. I see nothing in this law to favor the doctrine of rotation to the time of committing an act of bankruptcy or of filing the petition so as to defeat the claim of the judgment creditor under circumstances like the present.

However, if this creditor's claim is to be overreached on such ground, the general assignee, in whom the property and right of property is vested, is the person to take measures for that purpose and not the debtor who can no longer have any interest in the question whether the fund shall go to a particular creditor or be distributed among all the creditors. Considering the nature and object of this bill, being rather a proceeding *in rem* than *in personam*, it seems to me that the plea is wrong in attempting to meet the whole bill, when the effect of it is only to exonerate the defendant from any further personal liability.

It must, therefore, be overruled, with costs—giving leave to the defendant to set up the same matter in an answer.

(a) See Conkling, J., in *The matter of Allen*, 5 Law Reporter, 362.

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HOFF.

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Where a judgment debtor is entitled to a share of personalty by the death of a relation, and such death happens before the filing of a creditor's bill, but administration on the estate of the decedent takes place afterwards: *Held*, that a supplemental bill might be filed to impound the fund, although the creditor, had he known of the debtor's right to the fund, might have brought it in by an amendment to the original bill.

October 8,  
1845.

*Pleading.  
Practice.  
Supple-  
mental bill.  
Amend-  
ment.*

A JUDGMENT creditor's bill had been filed against George Brinckerhoff, as the judgment debtor and Thomas F. Richards, as his assignee under voluntary assignment. Answers had been put in and replications filed.

The complainants then filed a supplemental bill; and therein, after setting forth the original bill and its position, added the following allegations and clauses: "And your complainants further show that they are informed and believe and so state the fact to be, that the said defendant, George Brinckerhoff, at the time of filing the original bill in this cause was entitled, as one of the heirs at law of his mother Dorothea Brinckerhoff, deceased, or in some other way was interested in or entitled to a share or portion of the present estate of the said Dorothea Brinckerhoff, deceased, which claim was not known to your complainants at the time of filing the said original bill. And your complainants further show, by way of supplement, that they have been informed since the filing the replication to the said last answer to the said original bill and so state the fact to be that since the filing of the original bill in this cause, to wit, on the ninth day of March in the year one thousand eight hundred and forty-two, letters of administration upon the goods, chattels and credits of which the said Dorothea Brinckerhoff died possessed was granted by the surrogate of the county of New-York to John L. Lawrence, Esquire, of the city of New-York; and that your complainants have been, on this fourth day of June in the year one thousand eight hundred and forty-five, informed on inquiry made of the said John L. Lawrence that there is a large amount of

the personal estate of the said Dorothea Brinckerhoff, deceased, now in the hands of the said John L. Lawrence, as such administrator, the particulars of which or amount your orators are ignorant and pray a discovery. And your complainants further show by way of supplement, that they have been informed, since the filing and service of the said last replication, that the said George Brinckerhoff succeeded in establishing his right to have his share, portion or interest in the personal estate of the said Dorothea Brinckerhoff deceased, paid to him; and that the said George Brinckerhoff is now entitled to a large amount of money as his share of the said estate which is now in the possession of the said John L. Lawrence, Esquire, of the city of New-York, as administrator of the goods, chattels and credits which were of the said Dorothea Brinckerhoff, deceased, at the time of her death; and that there is now in the hands of the said John L. Lawrence, as such administrator, a large amount of money, to wit, more than sufficient to pay off and satisfy the amount due on the said judgment and the interest and costs of the proceedings therein, which belong to the said George Brinckerhoff as his distributive share of the estate of the said Dorothea Brinckerhoff, deceased, and which he claims as one of the heirs at law of the said Dorothea Brinckerhoff, deceased, the particulars of which your complainants are ignorant and unable to state; and your complainants pray a full discovery of the same; and which the said George Brinckerhoff is now endeavoring to get the possession of to apply the same to his own use. And your complainants further show, that they are apprehensive that the said John L. Lawrence, the said administrator, will pay to the said George Brinckerhoff his distributive share of the estate of the said Dorothea Brinckerhoff, deceased, and that the same will be utterly lost to your complainants, unless said John L. Lawrence should be restrained or enjoined by the injunction of the court. And your complainants further show that they are advised and believe that the said John L. Lawrence, the said administrator of the goods, chattels and credits which were of the said Dorothea Brinckerhoff, deceased, is a proper and necessary party to the said bill of complaint as filed as aforesaid; and that they are also ad-

1845.

HOPE  
v.  
BRINCKER-  
HOFF.



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v.  
BRINCKER-  
HOFF.

vised and believe that they are entitled to the same relief against the said John L. Lawrence, as such administrator as aforesaid, as they would have been entitled to against the said George Brinckerhoff if the said John L. Lawrence had not been appointed such administrator and to the same relief as they would have been entitled to if the said John L. Lawrence, as such administrator as aforesaid, had been made a party to the said original and amended bill, to the end, therefore, &c." *Prayer*, that the said distributive share may be paid by the said John L. Lawrence to the receiver appointed in the cause or a sufficient amount thereof to pay and satisfy the amount due to the complainant, with costs; and for an injunction to restrain the disposition of so much as would be sufficient for that purpose, and adding John L. Lawrence as a party.

Demurrer interposed; and the argument on it now came before the court.

*Mr. Brinckerhoff, in pro. per.*

*Mr. William S. Sears, for the complainant.*

*June 9.*

THE VICE-CHANCELLOR:—The ground on which this demurrer is taken is, that the matter of substance introduced by way of supplement might have been introduced into the original bill by way of amendment; and, hence, that a supplemental bill is unnecessary. It is true that wherever the same end can be obtained by amendment, the court will not permit a supplemental bill to be filed (*Mitford*, 62); but new matter or events which have arisen since the filing of the original bill cannot be set up by amendment—and if they are intended to be invoked as a ground for relief, resort must be had to a secondary bill. Now, in this instance, the share or interest of the defendant in the estate of his deceased mother existed and was just as perfect before and at the time of filing the original bill as it was afterwards; and, by amending the bill, the complainants could have had a decree against the defendant Brinckerhoff, compelling him to assign the claim to a receiver so that the same should be collected and applied to the pay-

ment of their debt. If, however, it was necessary or if not actually necessary, yet if it was proper to make John L. Lawrence a party defendant in order directly to reach the funds in his hands as administrator, that course could only be pursued by means of a supplemental bill. John L. Lawrence, it appears, did not become such administrator and possess himself of the assets until long after the original bill was filed ; and, having funds in his hands belonging to the defendant, as this bill now shows, I cannot undertake to say that it was improper to make him a party and to ask that he be decreed to apply so much of it as may be necessary to satisfy the complainant's judgment debt and to have him enjoined in the mean time from paying the money over to the defendant. This specific relief, it seems to me, the complainants have a right to ask for ; and having that right, it is only available to them by a supplemental bill. If the complainants had been content to seek payment out of this specific fund, through the medium of an assignment by Mr. Brinckerhoff to the receiver in the cause, it might have been necessary to have done no more than to amend the bill by alleging the existence of the property in the hands of Lawrence under a grant of letters of administration, though subsequent. Such a bare allegation being admissible as an amendment within the exception to the general rule adverted to by the chancellor in *Buck, ex'r. v. Buck*, 4 Saratoga Sentinel Rep. 4, 5.

Order : that demurrer be overruled, with costs.

1845.

HOPE  
v.  
BRINCKER-  
HOFF.

1845.

HAWN  
v.  
BANKS.

HAWN and others v. BANKS and others, Executors, &c.

The testatrix gave to her niece M. P. and to her heirs \$6,000. The legatee died before the testatrix, leaving children. The court held that, observing this clause alone, the legacy lapsed; but, on the paramount rule of looking at the whole will and subjecting the same to examination and comparison, the court decided that the legacy went to the children of the legatee, inasmuch as a prior clause furnished a key for construing the bequest in that way.

The words *or* and *and* will be allowed a construction so as to stand in the place of each other in a will when the meaning of the testator, as collected from the whole will, clearly authorizes it; but not otherwise.

October 29,  
1845.

Will.  
Legacy.  
Words *or*  
and *AND*.

QUESTION on the lapsing of a legacy given under the will of Eliza McCarthy, deceased. The clause relating to it was in these words: "I give and bequeath to my niece Mary Phelan and to her heirs the sum of six thousand dollars." Mary Phelan died after the making of the will, but before the testatrix, leaving the complainants her children, next of kin and heirs at law. They now filed a bill for the legacy. The following is a copy of such parts of the will as are necessary to carry out the meaning of the court. "First, All my just debts, if any, and the expenses of my funeral to be paid as soon as may be after my decease. Second, I give and bequeath to my sister Margaret McGown wife of William McGown of Petersburg and to her heirs (except her daughter Mary Jane Wilcox and the descendants of her said daughter) the sum of seven thousand dollars. Third, I give and bequeath to my niece Mary Jane Wilcox, wife of John P. Wilcox, of Flower de Hundred, near Petersburg, Virginia, and to her heirs, the sum of six thousand dollars and also my silver tea set containing a tea-pot, sugar-dish, milk-pot, one dozen desert knives, one dozen forks and two small silver plated waiters. Fourth, I give and bequeath to my said sister Margaret McGown and to my said niece Mary Jane Wilcox, my likeness and that of my daughter. Fifth, I give and bequeath to my said sister Margaret McGown all my silver plate and plated ware (except the said articles bequeathed said

"Mary Jane Wilcox) all my table and bed linen, my wearing apparel and jewelry, except my gold watch and chain. Sixth, I give and bequeath to my niece Mary Phelan, wife of Mr. Hawn, late state treasurer of the state of Alabama and now cashier of the State Bank of Alabama at Tuscaloosa and to her heirs the sum of six thousand dollars and also my gold watch and chain. Seventh," &c. &c.

1845.

HAWN  
v.  
BANKS.

A demurrer was interposed.

Mr. *Sears*, in support of the demurrer.

Mr. *E. Sandford*, contra.

THE VICE-CHANCELLOR :—The question is, whether the legacy given to Mary Phelan lapsed or belongs to her children, as legatees in her place?

July 6,  
1846.

I take it that this will was drawn by a professional hand. There are various indications of the fact about it; and it is the more surprising that such words should have been employed as are here used to express the meaning of the testatrix, which must have been very plain and simple, one way or the other, and very easily understood by a draughtsman.

If she meant to make her niece the sole legatee of the six thousand dollars, why were the words "and to her heirs" superadded? for, surely, they were unnecessary and must be regarded as mere surplusage if such was her intention; and, on the other hand, if her intention was to give the legacy to her niece and in the event of her death then to her children or next of kin in her stead, why was not the will so written or some other words used which would have expressed that plain and simple meaning—merely changing the copulative *and* into the disjunctive *or* would have gone far towards establishing that meaning: *Gettings v. McDermott*, 2 My. & K. 69. But, as the words stand in this will, the court has to deal with them in the best way that it can. If the sixth clause in the will which contains this bequest is alone to be looked at, it is very clear that the legacy must be deemed to have lapsed: the words "and to her heirs," in their strict sense, not being substitutional, but

1845.

MAWY  
v.  
BANKS.

words of limitation. The court is bound, however, to look at the whole will and examine the context, in order to get at the meaning of any particular part, for, by comparing one passage or phrase with another and observing the sense in which the same words are used in different places in the same instrument, we can form a pretty accurate conclusion as to the meaning and intention of the words as thus used. A will is to have effect according to the intention of the testator, whenever that intention can be discovered from the instrument itself, provided no rule of law is thereby violated. To carry out that intention "and" may be construed to mean *or* and *e converso* "or" changed to *and*. This will not be done, however, unless it be clearly authorized by the meaning of the testator as collected from the whole will: 2 Roper on Legacies, 291 to 294. Now, we have in this will a key to the meaning of the testatrix in the use of the same word "and to her heirs." It is in the second clause, and where the words first occur, that they are clearly used in a substitutional sense, that is to say, as intended to give the legacy over to the children or daughters of the first named legatee and thus prevent a lapse. And it is fair to conclude that, in every subsequent clause of the will, where the same words are used and in precisely the same connection, they were used in the same sense and with the same understanding and meaning.

In my opinion the complainants are entitled to the legacy according to the showing of their bill; and the demurrer must be overruled, with costs.

1846.

MEAD v. RICHARDS and others.

MEAD  
v.  
RICHARDS.

Where an injunction bill is filed with affidavits annexed and an answer on oath is waived, but the same is put in under oath and strong affidavits also are read in support of a motion to dissolve the injunction, the dissolution is not a matter of course, especially where proofs may have to be taken before a correct decision can be had.

MOTION to dissolve an injunction. The complainant had purchased real estate in the city of New-York, subject to a lease. Circumstances seemed to render it doubtful whether a certain lease, alleged to be on the premises, was a *bona fide* instrument; and, as proceedings were taken for summary possession and the buyer of the property considered there was an attempt to force him unequivocally to buy parties off, he filed the present bill, to which affidavits were attached. It is deemed unnecessary to give the particulars of the case, as the suit is reported simply for the exposition of the rule contained in the decision of the court.

Jan. 6.  
1846.

*Practice.  
Injunction.*

Mr. J. C. Smith, Mr. Bonney and Mr. Woodward, for the respective defendants.

Mr. C. Edwards, for the complainant.

THE VICE-CHANCELLOR:—This is not a case in which it is a matter of course to dissolve the injunction on the denial by the answers of all the equity of the bill. The oath of the defendant in answering is waived; and the bill has affidavits annexed, verifying the principal facts on which the equity is based. And although these facts are strongly controverted, it is, after all, but a conflict of affidavits which lead to no very definite or certain conclusion. Proofs may have to be taken, in the usual manner, before the cause can be properly or correctly decided. In the meantime, the court is authorized, in its discretion, to retain the injunction until the hearing. If it shall, then, be found not sustainable and the defendant, O'Rielly, shall appear to have been

Feb. 24.

1846.

RIKER  
v.  
DARKE.

unjustly kept out of possession of the premises and of the rents and profits during the term he claims to be entitled to, this court can recompense him in damages by means of the injunction bond, as to the sufficiency and amount of which bond there appears to be no complaint. But, notwithstanding the strong assertions in the answers and affidavits on the part of the defendants, the case is open to a good deal of criticism and suspicion as to the good faith and fairness of the transaction in relation to the lease and to O'Reily's becoming the purchaser of it for one hundred dollars in reality on his own account.

Under the circumstances, I think there can be no danger of working injustice to the defendants or any of them by retaining the injunction and undertaking to determine the rights of parties in this court, instead of dissolving it and allowing them to litigate at law.

Motion denied.

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RIKER and wife v. DARKE and others.

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A tenancy by the curtesy initiate is a sufficient estate in lands upon which to base a partition suit.

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Jan. 21,  
1846.

Partition.  
Tenant by  
the curtesy  
initiate.

DEMURRER to a bill for partition, on the ground that the parties filing it had not such an interest in the estate proposed to be partitioned as authorized the bill. This interest was a dower right and also the grant of a tenancy by the curtesy initiate.

Mr. *L. Livingston*, in support of the demurrer, referred to *Wood v. Clute*, 1 Sandford's V. C. Rep. 199; *Alnat* on Partition, 94.

Mr. *Sears*, contra, cited *Sears v. Heyer*, 1 Paige's C. R. 484.

1846.

WILDES  
v.  
CHAPMAN.

May 12.

THE VICE-CHANCELLOR :—It is conceded that the complainants, in virtue of the wife's dower in the lands, cannot, on that ground, file a bill to partition the estate as between her and the heirs. But this bill does not proceed on that footing. It shows that the complainant is grantee of the legal estate of the defendant George Darke, as tenant by the curtesy initiate; and that is an estate or interest in land whereon a bill for partition may be filed.

The demurrer must be overruled, with costs.

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WILDES and others v. CHAPMAN and others.

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Where, on a dissolution of copartnership, one partner assigns all his rights in its stock and properties to the other and the latter covenants to apply such stock and properties to the debts of the firm, its creditors may follow it for that purpose, notwithstanding the receiving partner make divers transfers of it in fraud of the creditors and even though both parties are applicants under the bankrupt law. The effects become a trust fund for the creditors under the covenant.

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DEMURRER taken by one of the defendants, Volney Gunn, to the bill. The complainants were judgment creditors of Marvin McNulty and George M. Chapman, who had been partners under the style of McNulty & Chapman; and from which firm McNulty had retired and Chapman had transferred to him the property and effects of the firm and covenanted to apply the same to the payment of its debts; but instead of doing so, he, in fraud of its creditors, as the bill alleged, made over parts of the property of the firm to divers persons, and among others to the defendant Volney Gunn. After all this both McNulty and Chapman applied for their respective discharge under the bankrupt act; the former passed, but the latter, on opposition, did not. The bill

Jan. 14,  
1846.

Debtor and  
creditor.  
Trust  
fund.  
Bankrupt  
law.



1846.  
WILDES  
v.  
CHAPMAN.

sought to make the assets of the firm of McNulty & Chapman, wrongly disposed of by Chapman, pay the copartnership debts on the ground that they were a trust fund for such purpose.

The defendant Volney Gunn interposed a demurrer.

Mr. Norton, in support of the demurrer.

Mr. J. T. Doyle, contra.

July 28.

THE VICE-CHANCELLOR :—If the bill in this cause is to be regarded as a judgment creditor's bill, founded on the recovery of a judgment and the issuing and return of a *fi. fa.* unsatisfied, then it is defective in not containing all the averments required by the one hundred and eighty-ninth rule; and what would be a greater objection is, that it shows, upon its face, that all the debtor's rights of property, which the bill points out, specifically passed by the decree in bankruptcy and became, by operation of law, vested in the general assignee and such general assignee is not made a party to the bill.

But this pleading is not to be regarded in the light of a judgment creditor's bill, which seeks payment solely of the complainants' debt. It has another aspect: that of reaching property for the benefit of creditors generally of the former copartnership of McNulty & Chapman, on the ground of a trust created in relation to the property of that partnership for the benefit of all such creditors by the deed dissolving the partnership and transferring the property to Chapman solely, in trust for the purpose of paying the debts and under a covenant on his part so to apply it. The bill shows enough to raise such a trust, and it traces property thus appropriated but diverted from that object and attempted to be misapplied by various assignments and transfers subsequently made. As a trust fund, under the deed of dissolution, the partnership creditors have a right to pursue it in the hands of these defendants and, among the rest, in the hands of Mr. Gunn. And, in this respect, according to Nelson, J., in *Cunningham v. Freeborn*, 11 Wend. R. 257, the bill is such as the complainants were at liberty to

file. Viewed in this light, all objection on the score of the decree in bankruptcy vanishes. The creditors claim under a trust created for their benefit, which the subsequent proceedings in bankruptcy could not affect or impair.

The demurrer of the defendant Gunn must be overruled, with costs.

1846.

WADDELL  
v.  
BRUEN.

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WADDELL and wife v. BRUEN and others.

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An injunction is not to be granted on filing a bill, where it is not essential to secure rights and where the filing of a notice of *lis pendens* will answer. Injunction dissolved where the allegations embracing the equity are on information and belief.

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BILL filed against the defendant Matthias Bruen, on the ground that he, being trustee, wrongly took the title in himself and in the defendant Alexander M. Bruen; and that certain releases, executed by the complainants, were void. The allegations, embracing the equity, were charged on information and belief. A preliminary injunction had been granted; a motion was now made on the bill alone, to dissolve it.

Jan. 28,  
1846.

Practice.  
Injunction.

Mr. Bidwell, for the motion.

Mr. Ellingwood and Mr. G. Wood, opposed.

THE VICE-CHANCELLOR:—The bill, on its face, shows a clear case enough for equitable relief. But the material allegations are only on the complainant's information and belief. They are not such allegations, therefore, as entitle the complainants to a preliminary injunction. Nor is such an injunction essential in order to secure the complainants in their rights. The filing of a *lis pendens* will answer all the purposes of the injunction granted *in limine*: *Osborn v. Taylor*, 5 Paige's C. R. 515.

Feb. 24.

Injunction dissolved. Costs may abide the event.

1846.

WILKES  
v.  
HENRY.

## WILKES v. HENRY.

On the master reporting a plea as true, the complainant can except on the point of the truth in fact. The proceedings referred to by plea are produced; and if the exception be overruled, the plea stands for argument as to the question of its being a bar.

Feb. 4.  
1846.

Pleading.  
Plea.  
Practice.  
Plea.  
Exception.  
July 28.

A PLEA had been referred to a master, who made his report allowing it as true. The complainant took an exception.

Mr. *E. Wilkes*, in support of the exception.

Mr. *Lawton*, contra.

THE VICE-CHANCELLOR:—The question on this exception to the master's report is not whether the plea is a good plea and sufficient, in point of law, to bar the discovery and relief claimed by the bill, for that question can only be determined when the cause is set down for hearing on the plea after the master's report finding it to be true in point of fact has become confirmed: Rule 48; *Hay v. Philips*, 9 Paige's C. R. 293.

But the question presented by this exception is a mere question of fact, whether the matters set out in the plea do really exist or, in other words, whether the plea is true in point of fact? The master reports that it is true. The complainant denies, by his exception, that it is true. Thus, the parties are at issue; and this issue is to be decided by the evidence. The former proceedings to which the plea refers are produced in evidence; they speak for themselves; and by comparing the statements of the plea with those proceedings, I find that all that the plea contains, as allegation of fact, is fully verified by those proceedings; and I do not see how the master could have come to any other conclusion. The master's report must, therefore, be confirmed; and the plea allowed to stand for argument on the question of its sufficiency as a bar.

Order that the exceptions be overruled, with costs.

1846.

GRIFFIN  
v.  
BURTNETT.

GRIFFIN v. BURTNETT and others.

G. agreed to advance money in ten instalments as buildings progressed; and took a mortgage to secure the whole amount. He made eight payments; assigned his agreement; and foreclosed on default of payment of interest. O. advanced the two last instalments on the strength of such agreement; and they were applied by the contractor to finish the buildings. The mortgagor, between the times of payment of the first and second instalments, had given a mortgage to L.; and a judgment was had against him before all the instalments were exhausted. On a reference to ascertain who were entitled to a surplus arising on the sale under G.'s mortgage: *Held*, that O. was (protectively under G.'s mortgage) entitled to priority for the two last instalments.

QUESTION as to who was entitled to a surplus of monies arising from a sale of mortgaged premises.

April 30,  
1846.

The complainant, Mr. Francis Griffin, had agreed (in writing) with Daniel H. Burtnett, who was about to erect seven dwelling houses on certain vacant ground, to advance him fourteen thousand seven hundred dollars—to be given in ten instalments, according to a specified progressive state of the buildings. And Burtnett gave to the complainant a bond and mortgage for securing the said amount of such fourteen thousand seven hundred dollars and interest. The condition of the bond made the principal money due, at the option of the complainant, on default of payment of any interest within twenty days after it became due. The complainant had advanced the amounts embraced in eight of the instalments, making nine thousand two hundred dollars. The following is a copy of Mr. Griffin's agreement:—

*Mortga-  
gor and  
Mortga-  
gee.  
Priority.  
Advances.*

“Whereas Daniel H. Burtnett of the city of New York, druggist, has, this day, made, executed and delivered to me his certain bond, bearing date the fifteenth day of November last, to secure the payment of fourteen thousand seven hundred dollars, with interest; and has also, together with his wife, made, executed and delivered to me a mortgage of the same date upon seven lots of land on the northerly side of Seventh street, between the First Avenue and Avenue A., con-

1846.

GRIFFIN  
v.  
BURTNETT.

taining one hundred and forty-seven feet in front on Seventh street—as by reference to the said bond and mortgage will more fully appear. And whereas said Burtnett is about to complete the erection of seven dwelling houses, which have already been commenced, on said premises, according to a certain contract made and executed by and between said Burtnett and George C. Tompkins and bearing date the sixteenth day of December instant according to the plans and specifications therein mentioned and referred to. And whereas no part of the said sum of fourteen thousand seven hundred dollars has yet been advanced or paid by me, but the same is to be paid and advanced, from time to time, as the said dwelling houses may be erected in manner herein specified. Now, in consideration of the premises and of one dollar to me in hand paid by said Burtnett, I do hereby agree to pay and advance to him the said sum of fourteen thousand seven hundred dollars in payment as follows, to wit :

1. The sum of seven hundred dollars on the execution of this contract.
2. When the second tier of beams is on and the brick and stone work up as high as the partitions, cellar beams all properly secured as intended to be and window frames painted, the further sum of nine hundred dollars.
3. When the third tier of beams is on, the brick and stone work up as high and window frames painted, the further sum of seven hundred dollars.
4. When the fourth tier of beams is on, the brick and stone work up as high and window frames painted, the further sum of seven hundred dollars.
5. When the roof is on and tinned, cornices and leaders up, chimneys topped out and all the brick work up as high and the first coat of paint on the wood work, the further sum of sixteen hundred dollars.
6. When the floors are laid, all the partitions set, scratch-coat on and windows in and first coat of paint on, eighteen hundred dollars.
7. When the grounds are up, the ground plastering on floors stepped up, yards regulated and finished, areas built front and rear, sidewalks flagged, curbs set, bell tubes all in and first coat of paint on, the further sum of fourteen hundred dollars.
8. When the hard finished cornices and ornamental work are finished, the further sum of four hundred dollars.
9. When the front stoops are up, iron railings and

VICE-CHANCELLOR'S COURT.

675.

balconies up, mantles and grates set, closets shelved, doors all hung, locks and fastenings on, bells hung, blinds hung, first coat of paint on, two thousand dollars. 10. When the said houses shall be, in all things, complete, according to the plans and specifications, the remaining sum of forty-five hundred dollars. The said payments are to be made, from time to time, to the said Burtnett or his assigns as above provided and when I shall receive the within certificate of Thomas Thomas, Jr. that the work has been done as above specified. The interest is to be charged on said bond and mortgage only on the amounts advanced from time to time as above provided and from the times they shall be respectively advanced. None of the above payments shall be required of me until the said Burtnett shall, from time to time, produce to me searches and satisfactory evidence that there are no judgments against him nor any liens or incumbrances on said property prior to or affecting the said mortgage to me. Witness my hand and seal, in duplicate, this twenty-sixth day of December one thousand eight hundred and forty-three.

FRANCIS GRIFFIN [L. S.]

"Sealed and delivered in the presence of

"THOMAS E. DAVIES."

Between the time of the payments of the first and second instalments and on the twentieth day of February in the year one thousand eight hundred and forty-four, the said Daniel H. Burtnett had made a mortgage of the same ground to Justus D. Miller for securing two thousand four hundred dollars and interest; and which, on the third day of August one thousand eight hundred and forty-four, was assigned to John S. Lawrence, one of the defendants herein.

The complainant, on a default of payment of interest, foreclosed; and there was a surplus.

On a reference of claims for this surplus, the defendant William Ogilvie claimed a portion of the surplus monies—setting forth, as a basis of his claim, that the agreement which Mr. Griffin, the complainant, had signed to advance the aforesaid instalments, had been assigned to the contractor (who had agreed to erect the house) in order to enable him to complete the same; and was, by him, assigned to Mr. Joseph Blunt of the city of New York. The contractor,

1846.

GRIFFIN  
v.  
BURTNETT.

1846.

GRIPPIN  
v.  
BURNETT.

according to an arrangement and agreement with the said Joseph Blunt, made at the time of the said assignment to him, made certain drafts on him in favor of the persons furnishing materials or labor or other things for the erection of the said houses, which drafts were accepted by the said Joseph Blunt payable when in funds under the aforesaid agreement. The payments made by the complainants had passed through Mr. Blunt's hands. The contractor, then, in order to enable himself to go on with the houses and to entitle himself to the payment of the residue of the said instalments, procured advances from the said William Ogilvie upon acceptances of a similar character to those paid by Mr. Griffin, to be paid out of the ninth and tenth instalments under the said agreement. The contractor expended these advances towards the erection of the said houses before the commencement of the present suit. The amount of one thousand dollars had been paid by the said Joseph Blunt on one of the acceptances of the said Ogilvie and the amount remaining unpaid on the drafts was five thousand five hundred dollars, which, with interest, was the extent of Ogilvie's claim.

The defendant Moses Y. Beach claimed under a judgment obtained by him against Daniel H. Burnett in the supreme court on the twenty-seventh day of April, one thousand eight hundred and forty-four.

The master reported that he allowed the claim of John S. Lawrence as a lien on the surplus monies prior to the lien of the said William Ogilvie; and that he allowed the claim of the said Moses Y. Beach also as a lien on the said surplus prior to the said claim of the said William Ogilvie.

William Ogilvie excepted; and the exception now came before the court.

Mr. *T. C. Pinckney*, for William Ogilvie.

Mr. *Nagle*, for the claimant Moses Y. Beach.

Mr. *Clarke*, for the defendant John S. Lawrence.

Sept. 30. THE VICE-CHANCELLOR :—It appears to me that if Mr.

Griffin had paid the whole of the ninth and tenth instalments which his mortgage was intended to secure, there would be no doubt of his right to reimbursement out of the mortgaged premises for those instalments as a prior claim to the Miller mortgage now held by Mr. Lawrence, although those instalments might not have been paid until after the Miller mortgage was given and recorded. And if Mr. Griffin would have had that right, I do not see why, in equity, Mr. Ogilvie or any other person advancing those same sums and for the same purposes as Mr. Griffin had agreed to do may not be allowed to claim the benefit of the mortgage in his stead.

Now, it appears that the three drafts of the seventh of May and tenth of June one thousand eight hundred and forty-four, which Mr. Ogilvie now holds and which he has given the money for, were drawn specifically for the ninth and tenth instalments, under the Griffin contract, and it appears clearly, from the testimony, that the amounts of those drafts were expended in and upon the buildings. Mr. Ogilvie is, consequently, entitled to stand in the place of Francis Griffin and to be subrogated to all his rights as mortgagee, had he actually furnished these monies. In my opinion, the master erred in excluding Ogilvie's claim for the amount of the money due to him on the drafts. The exception taken by the latter to the master's report must, therefore, be allowed; and this matter has to be referred back to the master to compute the amount due to Ogilvie on the three drafts and with directions to report the same as a lien prior in equity to the mortgage held by the defendant Lawrence.

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Deed of the 5th of October 1831, executed by husband and wife in consideration of the grantee, who was the wife's mother, releasing dower in the daughter's land. It had been acknowledged and left in possession of the daughter for the mother. After the death of the daughter's husband, the deed was found mutilated by having had the signatures of the grantors and subscribing witnesses cut out. After this (on the 17th of January 1845) it was recorded: *The court held*, that it was to be taken as an executed and delivered deed; but that as the grantors continued in possession exercising all acts of ownership, the grantee was affected by subsequent instruments and that an after mortgage by this husband and wife, recorded before the mutilated deed got upon the record, had a preference.

Where a wife joins with a husband in a mortgage of his lands and he dies after sale in foreclosure and after confirmation of the report of such sale, she will not be entitled to any amount by way of dower out of any balance of the avails of the sale.

Where a person buys a portion of lands mortgaged and there is a surplus on foreclosure, he will not be allowed thereout the amount he purchased at, but only to as much as his portion contributed to the sale.

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*Deed.*  
*Mutilated*  
*deed.*  
*Priority.*  
*Mortgage.*  
*Dower.*  
*Surplus.*

On exceptions to master's report in relation to surplus.

On the third day of April 1821, a bond, with a mortgage for securing \$1,000 and interest on a farm and premises at Dosoris, Queens County, was executed by Ralph Peacock and wife to Jarvis Frost.

There was a deed dated the fifth day of October 1831, of the said premises or of a part thereof between Ralph Peacock and Eliza Ann his wife of the first part and Sarah Ann Betts of the other part, subject to the said mortgage. It appeared to have been recorded, but was mutilated prior to its being recorded, as will be seen by the report of Master Smith.

There was a deed from Ralph Peacock and Eliza Ann his wife to Leonard Beedle, dated the tenth day of December 1835, conveying one acre of land, part of the mortgaged premises. Leonard Beedle died intestate and unmarried, leaving Jehiel Beedle his father and heir him surviving. Jehiel Beedle and wife, by deed dated the seventeenth day

of August 1840, conveyed this one acre to the said mortgagee Jarvis Frost.

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On the first day of May 1840, Ralph Peacock executed a second mortgage on the premises in favor of William M. and Willett Weeks.

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Premises sold under the mortgage to Jarvis Frost; and the amount now in controversy was the surplus arising from such sale.

The mortgagee, Jarvis Frost, claimed as owner of the equity of redemption of the one acre lot.

Sarah Betts claimed under the mutilated deed.

Eliza Ann Peacock claimed as dower widow of Ralph Peacock.

William M. and Willett Weeks claimed as second mortgagees.

The following is a copy of the master's report and of the important part of testimony taken before him:

"In Chancery, &c.

Jarvis Frost v. Ralph Peacock and others.

TO THE CHANCELLOR, &c.—In pursuance of an order made in the above entitled cause by the vice-chancellor of the 1st circuit, bearing date the twenty-ninth day of March in the year one thousand eight hundred and forty-five, by which it was referred to the subscriber, one of the masters of said court, to ascertain and report the amount due to Jarvis Frost; and whether the same be a lien on the surplus moneys arising on the sale of the mortgaged premises in this cause and, also, as to the liens of any other person upon the said surplus moneys; and to ascertain the priority of the several liens thereon: I, *Wessell S. Smith*, the master named in said order, do certify and report that, from a certificate of the clerk of this court served upon me, it appeared that the following claims have been filed to the surplus moneys in this cause, viz.: a claim by Eliza Ann Peacock, by Sarah Betts, by William M. and Willett Weeks and one by Jarvis Frost, by their several solicitors. And, also, that I had had a certificate of the names of the defendants who have appeared in this cause laid before me, whereupon I caused all the said parties who had filed their

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claims to said surplus and who had appeared in this cause to be summoned to attend before me upon the matters so referred and that, upon such reference, I have been attended by the several claimants in person and, also, by their respective counsel ; and I have examined the several claimants upon oath touching the justice of their claims and the amounts due to them respectively ; and also examined upon oath the several witnesses produced by the claimants and the documentary evidence exhibited to me. And, from such evidence and examination, I do certify and report that Jarvis Frost made a claim upon said surplus moneys as being the owner of the equity of redemption of one acre of land being a portion of said mortgaged premises conveyed to him by Jehiel Beedle and wife by deed dated the 17th August 1840. And which said one acre of land was sold by the master and conveyed to the purchaser under the decree in this cause ; and that there is now due to the said Jarvis Frost the sum of one hundred and eighty dollars, being the amount of the consideration or purchase money paid by him on the sale and conveyance of the said one acre of land to him as aforesaid ; and that the said claim is a lien upon such surplus moneys and has priority of all other claims thereon. And I do further certify and report that Sarah Betts claimed to be entitled to the whole of said surplus moneys, as being the owner of the equity of redemption of the whole of the said mortgaged premises under and by virtue of a deed bearing date the 3d day of October 1831, made by Ralph Peacock and Eliza Ann his wife to said Sarah Betts, but which said deed had been mutilated by having the subscription of the names of the grantors and of the subscribing witnesses cut out at the end. And from the evidence produced before me, I am of opinion that the said deed never was delivered by the grantors to said Sarah Betts ; and that no estate passed under it, but that the same was cancelled and destroyed by being mutilated and is void. And I do, accordingly, report that the said Sarah Betts has no claim upon said surplus moneys and is not entitled to any part thereof. And I do further certify and report that Ann Eliza Peacock claimed to be entitled to a right of dower in said surplus moneys as the wife of

Ralph Peacock the mortgagor ; but, from the evidence produced, it appears that the said Ralph Peacock was living at the time of the sale of the said premises and at the time the report of sale in this cause was confirmed. I do, therefore, report that the said Eliza Peacock is not entitled to a right of dower (except an inchoate right) in said surplus moneys and that she has no claim thereon. And I do further certify and report that the said William M. and Willett Weeks claimed to be entitled to said surplus moneys under and by virtue of a certain bond and a mortgage bearing date the first day of May 1840, made and executed by the said Ralph Peacock to secure to them the sum of five hundred and fifty dollars with interest. And I do report that the same is a lien upon the surplus moneys in this cause ; and I have computed and ascertained the amount due to the said William M. and Willett Weeks upon the said bond and mortgage ; and that the amount so due, up to and including the date of this report, is the sum of seven hundred and fifty-nine dollars and forty-nine cents ; and that the said William M. and Willett Weeks are entitled to be paid out of said surplus moneys, after payment of the amount due to Jarvis Frost as above mentioned or so much thereof as the balance of said surplus moneys will amount to. And I do further certify and report that Sarah Betts, Junior, appeared on said reference by her counsel and gave verbal notice of a claim to the whole of said surplus moneys ; but no evidence having been produced in relation to such claim, I report that she has no claim thereon and is not entitled to any part thereof. And I do further certify and report that schedule A, hereto annexed, contains a statement of the amount due Jarvis Frost ; and, also, the amount due to the said William M. and Willett Weeks for principal and interest moneys, the period of the computation of interest and its rate and to which for greater certainty I refer. And I do further certify and report that schedule B, hereto annexed and making part of this my report, contains an abstract of the documentary evidence produced before me ; and to which, for greater certainty, I refer. I have also annexed the testimony, produced before me, to this report to be filed therewith and to which I refer. And I do further certify

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and report that the surplus moneys paid into this court amount to the sum of eight hundred and twenty-five dollars and forty-one cents ; and that no claims to said surplus moneys other than those herein above mentioned have been left with me either previous or since the report of sale in this cause was filed. All which is respectfully submitted. Dated October 9, 1845.

WESSELL S. SMITH,  
*Master in Chancery.*

(TITLE.)

“Schedule A. referred in the foregoing report :

Amount paid by Jarvis Frost, as the consideration or purchase money on the conveyance of the one acre of land to him by Jehiel Beedle, being part of the mortgaged premises and sold and conveyed under the decree in this cause \$180 00

Bond made by Ralph Peacock to William M. and Willett Weeks, dated the first May 1840, in the penal sum of \$1100, conditioned to pay \$550 on the 1st May 1842, with interest thereon secured by mortgage of same date, principal \$550 00  
Interest thereon from 1st May, 1840, to 9th October, 1845,—5 years, 5 months and 9 days at 7 per cent. . . . . \$209 49

Amount due October 9, 1845, . . . \$759 49  
Dated October 9th, 1845.

WESSELL S. SMITH,  
*Master in Chancery.”*

(TITLE.)

“Schedule B. referred to in the foregoing report :

1. A deed from Ralph Peacock and Eliza Ann his wife to Leonard Beedle, dated 10th December, 1835, consideration \$300, conveying one acre of land, part of the mortgaged premises, with covenant of warranty duly acknowledged and recorded in the Queen's County Clerk's Office in Liber N. N. of deeds, page 396, the 11th June 1836, marked and referred to as exhibit A.

2. A deed from Jehiel Beedle and Mary his wife to Jarvis

Frost, dated 17th August 1840, consideration \$180, conveying the same premises, with covenant of warranty, duly acknowledged on the 28th August before Wm. Calkins, commissioner of deeds for Essex County, but not recorded—marked and referred to as exhibit B. Both these deeds were produced on the part of Jarvis Frost.

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3. A bond, produced on the part of William M. and Willett Weeks, dated 1st May, 1840, made by Ralph Peacock to William M. and Willett Weeks in the penal sum of \$1100, conditioned to pay \$550 on the 1st May 1842, with interest thereon marked and referred to as exhibit C.

4. A mortgage by the same to the same, of the same date, given to secure above bond upon that part of the mortgaged premises that was sold under the decree in this suit, excepting the lot that was sold by said Peacock to Leonard Beedle—duly acknowledged and recorded in the Queen's County Clerk's Office in Liber L. L. of mortgages, page 116, on the 22d day of May 1840, marked and referred to as exhibit D.

5. A deed produced on the part of Sarah Betts, dated the fifth October 1831, made by Ralph Peacock and Eliza Ann his wife to Sarah Betts, consideration \$1000, conveying the premises or a portion of them subject to the mortgage to Frost, this paper is mutilated by having the signatures of the grantors and of the subscribing witnesses cut out—this deed was acknowledged on the 5th October 1831. Recorded (in its mutilated state) in the Queen's County Clerk's Office in Liber 64 of deeds, page 281, the 17th January 1845, marked and referred to as exhibit E.

6. A bond produced on the part of Jarvis Frost, dated 3d April 1821, made by Ralph Peacock to Jarvis Frost, in the penal sum of \$2000, conditioned to pay \$1000, with interest at 6 per cent., on or before the 1st May 1822. There are various receipts endorsed of payments of portions of the principal and interest down to 1st May 1837, marked and referred to as exhibit F.

7. A mortgage given by Peacock and wife to the same, to secure the above bond and of the same date, upon a farm and premises at Dosoris in Queen's County, duly acknowledged and recorded in the Queen's County Clerk's Office

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Liber 2 of mortgages, page 22, &c. the 27th June 1821. The suit was instituted for the foreclosure of this mortgage. Marked and referred to as exhibit G.

8. A deed produced on the part of Jarvis Frost, dated 6th April 1837, made by Peacock and wife to Burrill Betts conveying, for the consideration of \$1000, with full covenants and free from incumbrance, a house and lot of ground, also two lots, part of the mortgaged premises, but excepted out of the sale. Duly acknowledged and recorded in the Queen's County Clerk's Office in Liber R. R. of deeds, page 301, the 2d May 1837, marked and referred to as exhibit H.

9. A release produced on the part of Jarvis Frost, dated 11th December 1835, made by Jarvis Frost to Sarah Betts, administratrix of Burwell Betts, deceased, consideration \$552 19; releasing a portion of the mortgaged premises. Duly acknowledged and recorded in the Queen's County Clerk's Office in Liber L. L. of deeds, page 434, the 21st January 1836, marked and referred to as exhibit I.

10. The pleadings, viz.: the bill, the answers of Burwell Betts and Peacock and wife and the decree.

Dated October 9th, 1845.

WESSELL S. SMITH,
Master in Chancery.

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"Proofs taken before Wessell S. Smith, master, &c.

Mr. Hammond, on behalf of the complainant, produced a deed from Ralph Peacock and wife to Leonard Beedle, dated 10th December 1835. Acknowledged for a piece of land near the point of Ralph Peacock's land, containing about one acre \$300. Recorded in Queen's County, in Liber N. N. of deeds, 396, 11th June 1836. A deed from Jehiel Beedle and wife to Jarvis Frost, dated the 17th August 1840. Consideration \$180, for the same piece of land. Acknowledged August 28th, 1840. The complainant also proposes to be examined, touching his claim upon the surplus in this cause. Mr. Western objects, &c. *Jarvis Frost*, being duly affirmed, saith: Q. Who is the grantee in that deed made and executed by Jehiel Beedle and wife to Jarvis Frost, filed with the master and now shown to you? A. I am. Q. How much money did you pay as the consideration of

that deed? A. One hundred and eighty dollars. Q. To whom did you pay that money? A. To the order of Jehiel Beedle. Q. When did that take place? A. I am unable to say otherwise than by the date of the deed. The deed is dated 17th August 1840. It was paid a fortnight or three weeks previous to the date of this deed. Q. Did the interest which you thereby acquired continue in you until the foreclosure? A. It did. I have never parted with it. Q. Have you received any portion of the consideration money back? A. I have not. Q. Are the premises mentioned in the deed to you a part of the premises, described in the mortgage from Peacock and wife to you, foreclosed in this suit? A. They are.

Sworn, &c.

JARVIS FROST.

Benjamin Cocks, a witness produced on the part of Jarvis Frost, being duly affirmed, saith. Q. Where do you reside? A. In Glen Cove, town of Oysterbay. Q. What is your age and business? A. I am sixty-four years of age; and, a tailor by trade. Q. Were you acquainted with Jehiel Beedle in the year 1840 and before and after? A. Yes. Q. Where did he belong in 1840? A. In Shoreham, Addison County, State of Vermont. Q. Do you know whether he was the grantor named in the deed to Jarvis Frost now shown to you? (Exhibit B.) A. He was to the best of my knowledge. Q. Do you know the premises in that deed and can you say whether they form a part of the premises mortgaged by Ralph Peacock to Jarvis Frost? A. I know the premises, they are a part of the mortgaged premises. The mortgage was on it at the time of the purchase and covered it. Q. Did you know Leonard Beedle named in deed now shown to you and also the grantors in that deed? (Exhibit A.) A. I know them all. Q. Do you know the premises in that deed and are they the same mentioned in the deed from Jehiel Beedle to Frost? A. I know them, they are the same premises. Q. Do you know whether, at the time Peacock made that deed to Leonard Beedle, the land was subject to the mortgage to Frost? A. It was, and known to all the parties to be so at the time the money was paid. Q. Do you know whether the con-

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sideration money in that deed was paid? A. It was paid. Q. What relation was Leonard Beedle to Jehiel Beedle? A. He was his son. Q. Was Leonard married? A. No. Q. Had he any children? A. No. Q. Did he leave a will? A. No. Q. Is he now living and if not when did he die? A. He died five or six years ago last March. Q. Who administered upon his estate? A. Udney H. Everest. Q. Is he the person whose name appears as a witness to the deed from Beedle to Frost? A. He is the same person. Q. Did Jehiel Beedle take possession of the premises after the death of his son Leonard; and if so, how? A. He did as his heir at law. Q. Is he the same Jehiel Beedle who conveyed to Jarvis Frost? A. He is. Q. How are the premises situated as regards the other portions of the mortgaged premises—as regards value? A. It was considered to be the most valuable, being situated on the point near the dock. It was considered so at the time and would be so now. It is a building spot—there was a cellar dug and stoned up by Leonard Beedle while he owned it and remains there.

Affirmed, &c.

BENJAMIN COCKS.

As to claim of William and Willett Weeks: 1. A bond made by Ralph Peacock to William M. and Willett Weeks, dated the 1st May 1840, in the penalty of \$1100, conditioned to pay \$550 on the 1st May 1842, with interest thereon. Marked exhibit C. 2. A mortgage of even date with the above bond made by Ralph Peacock to the same persons to secure the payment of the above bond on premises at Peacock's Point. Recorded in the Queens county clerk's office in Liber L. L. of mortgages, page 116. May 22, 1840, marked exhibit D.

William M. Weeks, being duly sworn, saith, that he resides at Glen Cove, town of Oysterbay and is one of the persons named in the above mentioned bond and mortgage; that the premises mentioned in said mortgage are a part of the lands described in the mortgage from Peacock to Frost foreclosed in this suit and are the same premises sold under the decree in this suit; that there have been no payments made to this deponent or to Willett Weeks on account of the

same, but that there is now due to this deponent and the said Willett Weeks the whole principal sum of five hundred and fifty dollars with interest thereon from the date of the said bond according to the condition thereof; and that the same is so due over and above all the claims of the said Ralph Peacock or any other person against the same either by way of payment, offset or otherwise; and that he hath no other security or satisfaction therefor other than said bond and mortgage.

Sworn, &c.

WM. M. WEEKS.

The claim of Jarvis Frost was resumed and Benjamin Cocks being recalled and examined, saith. Q. Was the lot mentioned in the deed from Beedle to Frost sold with the rest of the mortgaged premises at the sale under the decree in this cause? A. It was.

Sworn, &c.

BENJAMIN COCKS.

As to the claim of Sarah Betts.

John L. Riker, produced as a witness on the part of Sarah Betts, being duly sworn and examined, saith, I am a counsellor at law doing business in the city of New York and was so on the thirtieth day of September 1831 and have been ever since; and that, from a memorandum book now in my possession and the deed now shown to me here, I find that on the thirtieth day of September 1831, I drew a deed for one Ralph Peacock from him and wife to one Sally Betts bearing date the fifth day of October 1831, now shown to me and marked exhibit E. That the said deed was prepared by me and is in my handwriting; that I am unacquainted with the parties named in the said deed, but I presume I drew the same at the request of Ralph Peacock, because I find that, on the said thirtieth September, by the entry to which I have before alluded, that Mr. Ralph Peacock paid me five dollars for drawing the said deed, that the deed was not then executed, but the day of the month was left blank to be filled up when the same should be executed. And that is all I know about the matter. Q. Was this an honest and *bona fide* transaction and done in the regular course of business in your office? A. The deed was honestly prepared in the usual manner, but, as to the transaction

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between the parties, I know nothing about it, nor have I any recollection thereof.

Upon cross-examination by Mr. Hammond.—Q. For aught you know, then, the said deed may have been perfectly voluntary? A. My instructions must have been to put in one thousand dollars as the consideration, but whether that was the true consideration I don't know. Q. Have you any knowledge beyond those instructions? A. I have not and that only looking at the deed the consideration is in my handwriting.

Sworn, &c.

J. L. RIKER.

Sarah Betts, being duly sworn, saith, that she is the grantee mentioned in exhibit E now shown to her. Q. Why was this deed executed to you by Mr. Peacock and wife? A. It was for property that I owned in Troy—a dower right which I held in that property. Q. Who sold that Troy property and what did you do when he sold it? A. Ralph Peacock and his wife sold the property—I signed off my dower right to Peacock and he gave me this deed for it. Q. Who did this Troy property come from? A. My first husband, Nathaniel W. Betts, who died and left it. Q. Who did he leave as his heirs? A. Myself, his widow, and Mrs. Peacock his only child. Q. Did you and Mrs. Peacock fix on any sum your dower was worth? A. I think it was \$1000 he was to give me. Q. Has that one thousand dollars ever been paid to you, except by this deed? A. It never has. Q. Have you ever given up your right under this deed? A. No. Q. Have you any other security or payment for that dower right except this deed? A. None. Q. Have you ever consented that this deed should be cut and cancelled as it now is? A. No. Q. Are the premises mentioned in the deed a part of the property mortgaged to Mrs. Frost? A. I have no doubt it is. I understood it so.

Sworn, &c.

SARAH BETTS.

Eliza Ann Peacock being called as a witness on the part of Sarah Betts, objected to. The master overrules objections and the counsel excepts. The witness being then sworn and examined, saith. Q. What was the consideration of the deed from you and your husband to Sarah Betts

now shown to you and marked E? A. It was given for her right of dower in property at Troy belonging to me and which myself and husband sold. Q. Was any amount agreed upon as the price which your husband should pay your mother for her right of dower? A. One thousand dollars. Q. Who got the money for which the Troy property was sold including the value of the right of dower? A. My husband, Ralph Peacock. Q. Do you know whether or not that one thousand dollars has ever been paid to your mother except by that deed? A. It has not been paid no more than by that. Q. Where and how near did you and your mother live to each other at the time that deed was acknowledged? A. We lived at Peacock's Point a short distance apart, on this property—about one hundred feet apart. Q. What was the age of your mother at that time and was she married or a widow? A. She is now about sixty-nine years of age. She had a husband then living—he was her second husband, Burwell Betts. Q. Is he now living; if not, when did he die. A. He died about ten years ago. Q. Was that deed now produced (exhibit E.) ever signed and sealed by any body, and if so by whom? A. It was by me and my husband. Q. Was it witnessed by any body, and if so, by whom? A. It was witnessed by Martin Davis now present. Q. Was your mother present at that time? A. Yes sir.

On cross examination.—Q. What did the property in Troy sell for? A. I think it was four thousand dollars.

Direct examination resumed.—Q. Who had the custody of this deed for safe keeping? A. I had myself. Q. Who did you get it from? A. I don't know as I can say exactly who gave it to me. I can't recollect about that. I expect that my mother gave it to me, but I can't recollect. Q. Who was you keeping it for? A. Mother. Q. Did any thing happen to that deed while you was keeping it, and if so what? A. Yes sir, it was mutilated. Q. Who by? A. I can't say. Q. Was it by the consent either of your mother or yourself? A. It was not. I discovered it myself and me and my mother found a great deal of fault about it when we discovered it. It was in my drawer when I first discovered it.

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Cross examined.—Q. How long after the execution did you discover the deed to be mutilated? A. I can't tell the exact time. Q. Was it before or after the mortgage to Weeks? A. It was before the mortgage to Weeks I think. Q. Does your recollection enable you to say whether you discovered the mutilation within a year after the deed was executed? A. I can't say about the time. It was more than one year. It might have been more than two or three. I can't recollect exactly about it. Q. Can you say it was more than four years? A. I don't know that I can.

Sworn, &c.

ELIZA ANN PEACOCK.

As to the claim of Eliza Ann Peacock.

Eliza Ann Peacock being duly sworn, saith, that I am the wife of Ralph Peacock. I was married the 15th January, 1815. Q. Have you ever released your right to this property excepting by the deeds to your mother, to Leonard Beedle and the mortgage to Frost? A. No sir. Q. (By the master.) Have you received any security, payment or satisfaction for your right of dower other than the consideration stated in the several deeds executed by you above spoken of? A. I have not.

Sworn, &c.

ELIZA ANN PEACOCK.

Martin Davis, another witness called on the part of Sarah Betts, saith. Q. Look at the paper marked exhibit E. now shown to you and say if you ever saw it before? A. I have seen it before. Q. Did that paper ever bear your signature, and if so for what purpose did you sign it? A. I signed that paper as witness. Q. Did any other person beside yourself sign it as a witness at the same time, and if so whom? A. Yes, sir, Burwell Betts. Q. Is he dead or alive at this time? A. He is dead. Q. Before you signed your name as a witness, did any persons, and if so whom, execute that paper? A. Yes sir, Judge James Hegeman. Q. Did any body else sign it; and if so, whom? A. Ralph Peacock and wife. When I answered Judge James Hegeman above, I understood you to mean witnesses. Q. Name all the persons that you can now recollect who were present at the time of the execution of this paper? A. Judge Hege-

man, Burwell Betts, Sarah Betts, Ralph Peacock, his wife and myself, that is all I can recollect.

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Cross examined.—Q. When was this paper signed by you? A. I can't say exactly—some ten or fifteen years ago. Q. Who called on you to witness this paper? A. Ralph Peacock. Q. Where were you when Ralph Peacock called on you? A. In the field at work. Q. In whose employ were you at that time and in what capacity? A. In Peacock's employ digging potatoes; I was hired by the year to work on the farm. Q. Look at the paper marked A now shown to you; did you ever see that before, and if so where? A. I never saw that paper before that I know of. Q. Look at the paper marked B now shown to you; did you ever see that before, and if so where? A. Not that I know of. Q. Look at paper marked D now shown to you; did you ever see that before? A. No. Q. Whose signature is that to the paper marked D? A. I can't say whose it was. Q. Have you ever seen Ralph Peacock write? A. Yes. Q. How often? A. I can't say how often—more than once, twice, three times, half a dozen times. Q. Are you acquainted with his handwriting? A. I have not seen his handwriting lately. Q. Were you acquainted with his handwriting ten or fifteen years ago? A. I have had some of his writings—I was acquainted with it. Q. And still you do not know in whose hand writing the words Ralph Peacock signed to paper D now shown to you are? A. I do not. Q. Do you know in whose handwriting the paper marked E now shown to you is—the written part of the deed? A. No sir, I don't. Q. How then do you know that that is the same paper you testified you have had your signature affixed to? A. I think I have seen the same paper; I know it by that hole in it. Q. Are there any particular marks in or about this paper excepting that hole by which you can identify this to be the same paper you then signed, and if so state them? A. I don't know that there is any particular marks. Q. Do you know of your own knowledge when, how and by whom this hole that you speak of in this paper was made? A. No sir, I don't. Q. When you speak of recognizing this paper as the same paper you once signed as a witness and knowing it by the hole in the paper, what

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length of time has it been since you first saw that hole in the paper? A. I can't say as to the time. Q. After this paper was signed by the several parties, how long was it before you next saw it? A. I can't say exactly, it might have been some two or three or four years. Q. Was the paper in the situation it is now as to being cut? A. There was a hole cut in the paper. I expect it was the same as it is now. Q. Where did you see it at the time you just spoke of? A. I saw Sarah Betts have it. Q. Did you ever see this paper again until after Jarvis Frost had commenced a foreclosure of his mortgage; and if so, state when and where? A. I saw it here the other day. I don't recollect I saw it before, except as I spoke of—it was either on Friday or Saturday last. Q. Who showed it to you then? A. It was either Mrs. Betts or Mrs. Peacock, I think. Q. Is that the time that you alluded to when you formerly said you saw this same paper in its mutilated state in the possession of Mrs. Betts? A. I saw her have it at home some three or four years ago with the hole in it. Q. Where do you now reside and in what capacity? A. I live with Mr. Peacock and work on the farm.

Cross examined.—Q. How old are you? A. Forty-nine. Q. What is your business? A. Sometimes working on a farm—sometimes on vessels—sometimes one thing and sometimes another. Q. What proportion of the last fifteen years have you been in the employ of Mr. Peacock or his wife? A. The bigger part of the time. Q. At the time you witnessed the instrument which you say you witnessed at the request of Mr. Peacock and at the execution of which you say Mrs. Peacock and Judge Hegeman were also present and that you and Burwell Betts became the witnesses, had that instrument which you then so witnessed the hole in it of which you have spoken at that time? A. No sir.

Sworn, &c.

MARTIN DAVIS.

Eliza Ann Peacock recalled on the part of Sarah Betts and examined by Mr. Western, saith. Q. Had Jarvis Frost any knowledge of the existence of this deed from yourself and husband to Sarah Betts (being exhibit E) and if so when? A. He was at my house where I now live about

three years ago this month. I can't be positive as to the exact time, but I think it was about that time—he was in the east part of the house in the room where we eat, with myself and two daughters; there was mention made of this deed, we was talking about it being given and so on—he then spoke and said he knew of it—that my step-father told him of it before his death.

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Cross-examined.—Q. When did your step-father die? A. 22d April, 1835. Q. Are you sure Mr. Frost said what you represent him to have said? A. I am sure. Q. How long did you forget it? A. I never forgot it at all. Q. Who mutilated that deed? A. I don't know; I did not see any one do it. Q. Have you any doubt who did it? A. I can think who did it, but as to say positively, that I could not do. Q. Who do you think did it? A. I think my husband done it. Q. I understand from the testimony you gave when you was up before that that deed laid in a drawer, to which you and your husband had equal access? A. Yes; I suppose we had equal access to it. Q. While it so lay there you discovered it to be mutilated? A. Yes; when I took it out I discovered it to be mutilated; that it had been cut by some one.

Direct examination resumed. Q. What did your husband say or do which made you think he did it? A. I can't say as any thing particular at the time; I expect it was done some time before I discovered it. We found fault with its being done; my mother and myself, I mean. Q. Did he ever boast of having done it and say now I have fixed the old woman or any thing like that? A. Not that I heard. Q. Did he say nothing to you nor you to him about it? A. He and I once had a conversation walking along in Brooklyn about four or five years ago; I talked to him and upbraided him about it, and asked him why he should do it, and he said he thought he would fix it; as near as I can recollect, that is the reply he made.

Cross-examined.—Q. If I have rightly understood your testimony, that deed, for aught you know, might have been mutilated before it was put into that drawer? A. No sir; I don't think it was mutilated when it was put in there; I

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think I put it in there myself; when I put it there it was not mutilated; and when I took it out it was.

Benjamin Cocks, a witness produced on the part of the complainant, being duly affirmed and examined, saith: Q. Were you acquainted with Leonard Beedle and Jehiel Beedle? A. Yes. Q. Were you executor to either, and which? A. I was executor to Jehiel Beedle. Q. When did Jehiel Beedle die? A. Four years ago next September. Q. Have you any recollection of the circumstances attending the sale of the piece of land described as being about one acre, by Peacock and wife to Leonard Beedle, part of the mortgaged premises in this case? A. Yes. Q. Will you relate these circumstances? A. Leonard Beedle purchased this lot of land of Peacock, and four shares in the dock at the same time, for the price of three hundred dollars for the land and one hundred dollars for the shares in the dock. He did not pay it to my knowledge; he gave his note for the amount, payable the first of May following; this note remained one year before paid, at seven per cent, and was then paid by his father Jehiel Beedle. Q. At what time did Leonard Beedle die? A. In the month of March, six or seven years ago. Q. In the administration of Jehiel Beedle's estate, did you ever discover the deed now set up by Sarah Betts? A. No; I never heard of it till last winter. Q. Were you conversant with the affairs of Leonard and Jehiel Beedle so far as their transactions in relation to this land went? A. Yes. Q. From the circumstance in which you stood and the business which you transacted, if there had been any real *bona fide* adverse claim against the title to this one acre of land, would it in your opinion have come to your knowledge? A. I should say it would, from what I had to do with it. I signed the note with Leonard as security; and there was no incumbrance to my knowledge except the mortgage to Frost.

Sarah Peacock, a witness produced on the part of Sarah Betts, in opposition to the claim of the complainant. Q. Do you know Jarvis Frost? A. Yes. Q. Have you any recollection of a conversation at the house of your mother in relation to a deed of your grand mother's? A. Yes, sir. Q. Who was present at that conversation? A. My mother

(Eliza Ann Peacock,) Mr. Frost and myself; I think my sister was there, but am not certain. Q. What took place? A. They were talking about a deed; I think my mother asked him if he knew there was such a deed and he said yes. Q. Did Mr. Frost say who had told him of it? A. Yes, sir; my grandfather. Q. What was his name? A. Burwell Betts. Q. What is the name of your sister whom you think was present? A. Mary Augusta. Q. When was this? A. I don't know when it was; I believe it was three years ago this spring; three or two, I am not positive which.

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Sarah Peacock, a witness again produced on the part of Sarah Betts. Q. Do you or not know of the decease of Ralph Peacock, one of the defendants in this suit? A. I do know of his decease. Q. At what time did he die? A. I don't know, but I believe it was in August, 1845. Q. Were you present at his funeral; did you see him interred; if so, where was it? A. I was; it was at Peacock's Point, in a burying-ground there.

Mr. *Western*, for the defendant Mrs. Peacock.

Mr. *J. Hammond*, for Jarvis Frost.

THE VICE-CHANCELLOR:—The deed—afterwards mutilated—from Peacock and wife to Sally Betts, dated October the fifth, one thousand eight hundred and thirty-one and acknowledged on that day before Judge Hegeman, is to be regarded as an executed and delivered deed: *Schrugham v. Wood*, 15 Wend. R. 545. It is to be allowed the same effect as between the grantors and grantee as if it had always been in the actual possession and keeping of the grantee. It is in vain, therefore, for Mrs. Peacock, although she be now a widow, to claim any rights of dower in the property, for she united with her husband in thus conveying. But, if that deed had not been made, it would be doubtful whether she could claim dower in the surplus arising from the sale in foreclosure, inasmuch as her husband was living when the decree was made and when the sale took place and for a considerable time afterwards: *Titus v. Nelson*,

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5 J. C. R. 452; and see *Hawley v. Bradford*, 9 Paige's C. R. 200. I think, with the master, that her dower is cut off entirely.

Then, how stands the case as between Mrs. Sally Betts, the grantor under that deed and the other parties who claim the surplus? By not recording the deed and by leaving Peacock in possession of the land, exercising all acts of ownership as if he were still the real owner, she has lost all right to interfere with those who have taken any subsequent deed or mortgage from Peacock in good faith and for valuable consideration, trusting to his original title and apparent ownership: 1 R. S. 756, § 1, 37. William Weeks and Willett Weeks, with their mortgage of the first day of May one thousand eight hundred and forty and duly recorded long before the deed to Mrs. Betts was recorded, stand in the light of *bona fide* purchasers for valuable consideration and are entitled to priority and preference over Mrs. Betts with respect to this surplus. That their mortgage was taken for a precedent debt and not for money advanced at the time makes no difference in respect to its being a valuable consideration. In addition, they parted with a right of action for two years, having allowed two years on the bond and mortgage for paying the debt.

The remaining question is between the Messrs. Weeks and Jarvis Frost, who claims one hundred and eighty dollars out of the surplus to reimburse him that amount of money paid for one acre of the premises sold under his decree, of which he had previously acquired the absolute estate by purchase. He was under no necessity to allow that acre of land to be sold. He might have had it exempt from the sale. The most that he can claim to be returned to him out of the proceeds is as much as it may be fairly supposed the acre sold for in proportion to the other land. In justice and equity he can claim no more; and what this acre has contributed to the sale cannot, I consider, be put down at more than eighty dollars. This sum Mr. Frost may be allowed; and the master's report is considered as modified accordingly.

The exceptions taken by the defendants to the master's report are overruled, except as to the allowance of one hun-

dred and eighty dollars reported to Mr. Frost, which must be reduced to eighty dollars. In all other respects the report is to stand confirmed. The master's costs on the reference are to be paid out of the surplus. The eighty dollars to Mr. Frost and the residue to William and Willett Weeks on account of their mortgage debt and all parties must be left to bear their own costs on the reference and of this hearing.

1844.

MITCHELL
v.
WILSON.

MITCHELL v. WILSON.

A landlord agrees to let premises for a year upon the proposed tenant's giving J. C. as security for the rent by the first of February and the tenancy to commence on the first day of May thereafter. The proposed tenant, who is already in under a former tenant, does not give the security by the day fixed, but offers another party who the landlord does not take and also offers S. C. a few days afterwards. The difficulty in getting J. S. is alleged to have been caused by the absence of a friend who was to have secured such suretyship: *Held*, that time was of the essence of the contract and the day having gone by, the landlord could not, then, be compelled to give a lease or receive J. C. as surety.

THE complainant, John Mitchell, desired to remain in certain leasehold premises as a tenant. They had been occupied by one William Augustus Spies, and whose lease was to end on the first day of May one thousand eight hundred and forty-five. He was desirous of moving out; and the complainant, as to hiring, was referred to the landlord, the defendant John Wilson. According to the bill, the latter agreed to give the complainant a lease for a year from the first day of May then next, at the yearly rent of four hundred dollars, with John Campbell as security; and that the intermediate first of February was to be the day when such security was to be given. That the complainant made arrangement with Spies as to the prior time and went into possession for the remainder of his year—and going to con-

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Landlord
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ant.
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ment.
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siderable expense in fitting up the place for his particular business. That, about the said first of February, the complainant called on the defendant with John P. Martinot, a man of property, and offered him as security for the rent, at the same time informing the defendant that he, the complainant, offered the said John P. Martinot as such security, instead of the said John Campbell, in consequence of the absence from the city of a friend on whom the complainant relied to request the said John Campbell to become such surety; that such friend, however, would be back in a day or two and that if the said John Wilson did not wish to take the said John P. Martinot, the complainant would give the said John Campbell as security as soon as such friend returned. That the said defendant said he would consider of it; but, soon afterwards, he wrote a letter to the defendant, dated the second day of February (1845) saying that the security offered was not satisfactory and that he now felt himself at liberty to let the store to the first applicant. That, almost immediately after this, the complainant was authorized and ready and offered the said John Campbell as his surety. The complainant insisted that the delay which had occurred was, in no way, prejudicial to the defendant and was unavoidable. He prayed that the defendant might be compelled to give the proposed lease; and he, in the mean time, restrained, by injunction, from disturbing the complainant's possession.

A preliminary injunction had issued.

The defendant, in his answer, showed that the complainant had applied to him to hire the premises then occupied by Spies; and that the defendant finally agreed to let him have them for another year at the rent mentioned in the bill, but this was on the complainant's unconditional promise that he would give as security for the rent John Campbell of the city of New York, paper maker, known to the defendant to be a most respectable and wealthy citizen; but the defendant denied that the complainant fixed the first day of February then next as the time when he would give such security: on the contrary, the defendant only agreed to let the said premises to the complainant on the express understanding and condition that the latter should procure the

said John Campbell to become such security as aforesaid and complete the agreement on or before the fifteenth day of January then next and that the complainant engaged to do so and parted with the defendant on that understanding. That about the said fifteenth day of January the defendant requested the said complainant to fulfil his agreement and give the said John Campbell as security for the rent; when the latter stated his inability to fulfil his said agreement and then, for the first time, mentioned that he relied on a friend of his to request the said John Campbell to become such security, that his friend was out of town and would return in a few days and he wished the defendant to grant him a little delay till his friend should return and he would then fulfil his agreement; that he, this defendant, did agree to wait and did wait until the first day of February thereafter to procure the consent of the said John Campbell to become such security and the complainant thereupon agreed to procure it by that time. That the defendant heard nothing more of the matter until about such first day of February, when the complainant informed him that his said friend was still absent and named the said John P. Martinot, but defendant gave him no encouragement that he would take the latter as surety. That, on the said first day of February, this defendant sent for the complainant and required him to fulfil the agreement on the terms before agreed upon, by giving the said John Campbell as surety for the rent. That complainant offered the said Martinot (who was with him) as substituted security. That, as the latter was a stranger, the defendant did not like to give a positive negative in his presence and did, therefore, say he would consider of it. And the complainant, at the same time, saying that if he, the defendant, was not willing to accept of the said Martinot as such security, he would procure the said John Campbell to become such security as soon as his, the said complainant's, friend should return to the city.

A motion was now made to dissolve the injunction.

Mr. *Clarke*, for the defendant.

Mr. *E. Paine*, for the complainant.

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THE VICE-CHANCELLOR.—The court is of opinion that time here, in relation to the giving of the security for the rent, was of the essence of the contract and could not be dispensed with. As the complainant failed to furnish the security within the time, he was not entitled to the aid of this court by injunction to protect him in possession as a tenant.

Order, that the injunction be dissolved. Costs will abide the event.

YATES and others, Trustees, &c. v. WOODRUFF *et al.*(a)

Default against a mortgagor refused to be opened in a mortgage case after decree and enrolment, although a sale thereunder was set aside and a large deficiency was found against the mortgagor.

A decree ordered a sale of mortgaged premises to be made by a master residing in the city of New York, but it was made by a master residing in Brooklyn, King's County: the court set aside the sale, although a purchaser had taken his deed.

June 24
and 25,
1846.

Practice.
Opening
default.
Mortga-
gor and
Mortga-
gee.
Decree.
Sale.
Master's
Sale.

THE bill of foreclosure in this case was filed on the first day of February in the year one thousand eight hundred and forty-two. It was grounded on a mortgage made by the defendant Oliver Woodruff and his wife. The bill had been taken as confessed against them for want of appearance. On the ninth day of July one thousand eight hundred and forty-five, a decree for sale was made, wherein it was directed that the mortgaged premises should be sold under the direction of "one of the masters of this court residing in the city of New York." It was put into the hands of A. V. Millard, Esquire, a master residing in Brooklyn, King's County, who made the sale. The property had been purchased by Isaac T. Greenwood, who paid the purchase money and received a deed from the master. The decree

(a) Affirmed on appeal.

made the defendant Woodruff liable for the deficiency between the amount due on the mortgage and the sum for which the property sold, which was nearly nine thousand dollars. The decree was enrolled on the fourth day of November, one thousand eight hundred and forty-five.

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The defendant Oliver Woodruff now presented a petition, alleging that he had no recollection of the service of the subpoena to appear and answer on himself or on his wife, nor could he, on a search amongst his papers, find any such subpoena. That he always relied on one George D. Strong to attend to the said mortgage and save harmless the said petitioner: for that it was made for his accommodation. And the petitioner went on to show how it was executed without any consideration; and also that certain rents in a receiver's hands had not been applied to lessen the amount of deficiency. Also, that he was not aware of the master's sale nor of the decree until some time in January last. He prayed that the decree might be opened and he let in to defend; and that the sale be set aside or vacated, &c.

Mr. *Bliss* and Mr. *Cutting*, for the defendant Oliver Woodruff.

Mr. *Noyes*, for the complainants.

Mr. *H. F. Clarke*, for the purchaser Greenwood.

THE VICE-CHANCELLOR:—Held, that the defendant made his application at too late a day to be let in to defend this suit. He did not excuse the delay; nor show any sufficient reason why he had omitted to answer the bill in proper season, if he really had any defence to make.

This branch of the motion was denied.

But he was of opinion that the sale by master Millard, under the decree—which directed a sale by a master “residing in the city of New York”—and he residing in King’s County—was irregular and void; and that there must be a resale, by a master “residing in the city of New York.(a)

(a) See *Fuller v. Van Geesen*, 4 Hill’s R. 176.

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On a master's sale, the buyer, in equity, becomes the owner from the day the report of sale is confirmed; and the premises are, then, at his risk, even though he has not received a deed.

A loss by fire, after such confirmation and before deed, falls upon the buyer; but not so where the loss is prior to a confirmation of the master's report. Where, in a partition suit, the buyer is one of the heirs in interest and an insurance has been had of the premises in the names of all the heirs and a fire destroys the buildings on the property after the time of sale as well as after a confirmation of the master's report of sale, but before a conveyance: *Held*, that the buyer, paying his full purchase money, was entitled to the benefit of the policy.

July 13,
1846.

*Master's
sale.*

*Order of
confirmation.*

*Vendor
and pur-
chaser.*

*Insurance
money.*

*Loss by
fire on pre-
mises sold
and not
conveyed.*

THE present suit was for partition of real estate, embracing premises at the north-easterly corner of Beaver street and New street in the city of New York.

On the tenth day of April in the year one thousand eight hundred and forty-five, a decree for sale was entered; and, on the thirtieth day of May thereafter, the above premises were sold thereunder by master Cambreleng to one of the complainants, Ann Nisbet, for eight thousand five hundred dollars. The master made his report of sale; and on the tenth day of July thereafter an order of confirmation was entered. Before any deed for the said premises was prepared or executed and on the nineteenth day of the same July, a two story brick front house and a brick addition in the rear, (standing at the time of the sale) were destroyed by fire; but these buildings had, prior to the sale, been insured against loss or damage by fire to the amount of two thousand five hundred dollars by the East River Mutual Insurance Company in the city of New York. The persons in whose favor the policy was made were "Martha Gates, Mary Smith, Elizabeth Smith and Aun Nisbet, executrixes of Gerardus Smith and the heirs of Gerardus Smith, deceased." These persons were the interested parties in the present suit—the bill being filed to partition the

property of their ancestor, the said Gerardus Smith deceased.

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The defendant Ann Nisbet (and who, as it is seen, became the purchaser) alone sent in preliminary proof of loss; but the insurance company required an affidavit of the loss from all the parties named in the policy; and, also, authorities from the others allowing Ann Nisbet to adjust and settle the loss. The complainant Martha Gates consented, but the defendants Mary Smith and Elizabeth Smith refused.

Ann Nisbet, as purchaser, claimed to have the right to the amount of loss under the policy paid to her; and she presented a petition for the purpose of compelling them to unite in obtaining it.

There was, also, a motion against Mary Smith and Elizabeth Smith for an attachment for not signing a paper authorizing a settlement of the claim by the master, &c.; and a cross motion to compel Ann Nisbet to complete her purchase irrespective of the insurance money.

Mr. B. F. Butler, for the defendants Mary Smith and Elizabeth Smith.

Mr. W. N. Dyckman and Mr. John Wallis for Ann Nesbit.

THE VICE-CHANCELLOR :—From the time when the master's report of sale became confirmed, and which was on the tenth day of July one thousand eight hundred and forty-five, Mrs. Nesbit became the owner of the house and lot, although no deed was executed conveying the property to her.

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The legal title could not vest in her without a deed of conveyance. In strictness of law, it was not a sale, but only a contract of sale until consummated by a conveyance of the legal title and estate: *Edwards v. Farmers' Loan Co.*, 21 Wend. 468; S. C. 26 Ib. 541.

In equity, however, it is regarded differently as to all the purposes of ownership, so that the buildings, after confirmation of the report of sale, are considered at the risk of

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the purchaser; and, if burnt down, the loss falls upon him. But, if destroyed after the contract of sale and before its confirmation by the court, the vendor or he in whose behalf the property is sold bears the loss. This is the rule in the English chancery with respect to judicial sales: *Ex parte Minor*, 11 Ves. 559. I see no reason why it should not be the rule here in sales under decrees which require confirmation before deeds can be given.

So, in ordinary cases of sales by private contract of parties. It is held in England that, if the purchaser agrees to accept the title after the abstract has been furnished, he, from that moment, becomes the owner; and if buildings are destroyed before actual conveyance, it is the purchaser's loss. This was held in *Paine v. Meller*, 6 Ves. 349, where Lord Eldon uses this language: "As to the mere effect of the accident itself," (which was a burning of the houses after the defendant had declared himself satisfied with the title and before the deed could be executed to him,) "no solid objection can be founded upon that simply, for if the party, by the contract, has become, in equity, the owner of the premises, they are his to all intents and purposes. They are vendible as his; chargeable as his; capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heirs." This is the true and correct doctrine of a court of equity. And applying it to the present case, Mrs. Nesbit was the owner of the house and lot to all intents and purposes on the nineteenth day of July one thousand eight hundred and forty-five, when the fire occurred, although not yet vested with the legal title.

Not having effected any other insurance after she became, thus, the owner and although she did not stipulate in her contract for an assignment of the policy then covering the house, yet, in equity and as a matter of justice between her and her co-tenants, she ought to have the benefit of the policy. And this court, having still the control of the proceedings in this partition suit and of the sale made under its decree, can regulate this matter between them and compel justice towards each other.

It is unequitable and unjust that these parties, Mary and

Elizabeth Smith, should undertake to withhold from Mrs. Nesbit the benefit of the policy of insurance, provided she pays, as they require her to do, the full price at which she bought the property with the house standing. They make a motion to compel her to complete the purchase; and, yet, seek to deprive her of the value of the house. Can they expect her to pay what she bid for the property and receive, for themselves, in addition, the full value of the buildings which have been actually destroyed?

There seems to me a clear, natural equity to the contrary; and I consider that it is competent for the court, while it has the subject matter of this sale under its charge, to direct what they shall do to carry the sale into effect without injustice to any party. Mary and Elizabeth Smith must be made to do whatever is in their power to do in order to give Mrs. Nesbit the full benefit of the policy of insurance. If they cannot, as the matter now stands, conscientiously make their affidavit of interest in the premises insured at the time of the loss by fire, so as to satisfy the terms of the policy and enable the claim for loss to be properly made, the court, by its order, can easily restore them to that interest by reducing the purchase money to be paid by Mrs. Nesbit from eight thousand five hundred dollars to six thousand dollars. This will give them an interest in the insurance money which is two thousand five hundred dollars to make up the full price that Mrs. Nesbit was to pay.

If, after the necessary preliminary proofs are furnished, a suit on the policy shall have to be brought, they must give their authority or consent to be plaintiffs in such suit, being indemnified; and should the claim upon the policy fail and the money not be recovered without any fault of Mary Smith and Elizabeth Smith, I do not see after all but the loss of the building will have to be borne solely by Mrs. Nesbit as the purchaser and owner and she will, ultimately, be obliged to pay the whole purchase sum of eight thousand five hundred dollars.

Ordered, that the defendants Mary Smith and Elizabeth Smith unite with the complainant Martha Gates and the petitioner Ann Nisbet in authorizing and empowering Stephen Cambreleng, Esquire, one of the masters of this court,

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to settle and adjust with the East River Mutual Insurance Company in the city of New York and to claim, collect and receive from the said company the loss occasioned by the destruction by fire, on the nineteenth day of July last past, of the two story brick front house and brick addition in the rear known as No. 15 Beaver street, corner of New street, New York, which said buildings were insured by the said company against loss or damage by fire by their policy dated, &c. in the names of the above named, &c. And, for that purpose, that the said defendants Mary Smith and Elizabeth Smith duly execute such written authority to be approved by the said Stephen Cambreleng as may be necessary to be executed by them; and that they make the necessary and proper affidavit or affidavits and statement of the loss which may be required and which the said Stephen Cambreleng shall advise to be proper to enable him to claim, collect and receive the amount of loss upon the said policy of insurance from the said insurance company. And it is further ordered that, on the receipt of the money from the said insurance company, the said master make a report thereof to this court, to the end that this court may, then, proceed to determine the rights of the parties to the said fund and how the same shall be disposed of. And it is further ordered that all other questions and all further directions on the said petition and the opposing affidavits be reserved until the coming in of the said report.

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v.
GIBSON.

FERRIS and others v. GIBSON.

A testator making his will and dying before the revised statutes (1830) devised houses to his grand-daughter H. "her heirs and assigns to her and their sole and only use for ever." Also, he bequeathed to her some stock; and named a trustee to receive the rents and dividends and apply the same to her education and maintenance until she should attain 21 years or be married and in either of which events "the houses and stock are to be at her own disposal." The devise was followed by these words: "And in case my said grand-daughter shall die without leaving lawful issue, then and in such case I give, devise and bequeath the said houses, &c. to my daughters A. E. and S. their heirs and assigns for ever." *Held*, that the limitation over was too remote and, therefore, void; and that the grand-daughter H. took and could convey an absolute fee.

BILL for specific performance and the goodness of title to the premises sold, being No. 162, Spring street, New York, dependent on clauses in the will of George Wragg.

The will was made on the thirty-first day of January one thousand eight hundred and twenty-five; and the testator had died and his will was proved in the same year.

The following are such clauses: "Item. I give and devise to my grand-daughter Hannah Barraclough, the daughter of William Barraclough, by my daughter Hannah his late wife, now deceased, the three following houses and lots of ground in the eighth ward of the city of New York on the southerly side of Spring street, commencing at the corner of Thompson and Spring streets, containing on Spring street about sixty-two feet and on Thompson street about sixty-nine feet, be the same more or less and which said three houses are now known and distinguished as numbers 158, 160 and 162 Spring street; and, also, one lot of ground on the southerly side of Beach street, between Varick and Chapel streets in the fifth ward of the city of New York, to have and to hold the same three houses and four lots of ground to my said grand-daughter Hannah Barraclough her heirs and assigns to her and their sole use for ever. Item. I give, devise and bequeath to my said grand-daughter Hannah Barraclough forty shares of the stock of the

Oct. 29.
1846.

*Will.
Devise.
Limita-
tion.
Remote-
ness.*

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North River Bank in the city of New York, now standing in my name and, also, twenty-five shares of the stock of the Chemical Bank in the city of New York now, also, standing in my name. And I hereby nominate, constitute and appoint her father, the said William Barraclough, her trustee to receive the rents, dividends and income of the said houses, lots of ground and stock; and to apply the same to the education, maintenance and support of my said grand-daughter until she attains the age of twenty-one years or is married—and in either of which events, the said houses, lots of ground and stock are to be at her own disposal. And in case my said grand-daughter shall die without having lawful issue, then and in such case, I give, devise and bequeath the said houses, lots of ground and stock to my said daughters Ann, Elizabeth and Sarah, their heirs, executors, administrators and assigns share and share alike for ever; and if any or either of my said children shall die before me leaving lawful issue, then and in such case such child or children shall have and take the share of his, her or their mother in the same manner as such mother would have done had she survived me under this my last will. And I hereby expressly declare, order and direct that every devise, legacy and bequest under this my will given, devised and bequeathed to my said daughters and grand-daughter shall not be, at any time, subject to the management or control, debts or engagements of any present or future husband or husbands and that the receipt of each and every of my said daughters and grand-daughter shall, in all cases whatever, notwithstanding coverture, be good and sufficient discharge to my executors and executrix hereinafter named and to every other person and persons whatever to whom the same may be given."

Mr. *Bidwell*, for the complainants.

Mr. *Thomas Warner*, for the defendant.

THE VICE-CHANCELLOR:—The will in question was made and took effect, by the death of the testator, anterior to the revised statutes. Of course, it is governed by the

rules of law as they existed before and not by such statutes.

This will, in the first place, devises the property in question to the grand-daughter Hannah, now Mrs. Ferris, "her heirs and assigns to her and their sole and only use for ever." This is as absolute a devise in fee as words can express. But in the next clause of the will are these words: "And in case my said grand-daughter shall die without leaving lawful issue, then and in such case I give, devise and bequeath the said houses and lots, &c. to my daughters Ann, Elizabeth and Sarah their heirs and assigns for ever." The question is, upon the effect and validity of this limitation over, in the event of his grand-daughter dying without leaving lawful issue?

It is well settled that such words are to be understood as applicable to an indefinite failure of issue at the death of the first taker; and, hence, that the contingency on which the limitation over is to take effect is too remote and, for that reason, the gift over is void. The case of *Patterson v. Ellis*, in Error, 11 Wend. R. 259, adjudicates this point; and determines that the courts are bound to give that construction to the very same words used in this will. The subsequent case of *Macomb v. Miller*, 9 Paige's C. R. 265; S. C. in Error, 26 Wend. R. 229, is to the same effect. These cases are decisive of the present, unless, indeed, there are words in this will to control the, otherwise, legal meaning and to show that the testator certainly meant the limitation over to take effect on a failure of issue at the death of his grand-daughter and not afterwards. The naming of his three daughters as the persons to take, it is said, does show that such was his meaning: because it is unreasonable to suppose that the testator looked forward to a more remote event than the death of his grand-daughter, when three of his own daughters should take the property. And the case of *Roe v. Jeffery*, 7 T. R. 589, is cited as bearing on this point. But it will be seen, by looking into that case, that the gift over was of life estates only, as well as to persons in existence; and that circumstance Lord Kenyon deemed a sufficient indication of an intention to confine the failure of issue to the death of the first taker. In the will in question

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the gift over is not in life estates or of any particular estate to his three daughters, as if he supposed it at all probable they would personally enjoy the benefit of the gift, but, on the contrary, the gift is to them in the most enlarged and general terms as tenants in common in fee, as if he expected their heirs and assigns, at any future time, however remote, to take whenever there should happen to be a failure of issue of his grand-daughter. There is nothing in the will, therefore, to take it out of the rule which had become fixed and firmly established as a technical rule of the common law, by a long line of judicial decisions upon the words "dying without issue," or "dying without leaving issue," as meaning an indefinite failure of issue and, therefore, too remote to found even an executory devise over upon.

In the revision of our statutes, this rule of construction has very wisely been changed and rendered much more agreeable to reason and common sense: 1 R. S. 724, § 22. But the statutory provision is inapplicable to wills which were in force before it was adopted.

There is another objection to this limitation over to the daughters of the testator, besides the one I have been considering; and which, I consider, is well founded. In the gift to his grand-daughter, of the houses and lots in question and of certain bank stocks, the testator, by his will, appoints a trustee to receive the rents and dividends and to apply the same to her education and maintenance until she should attain the age of twenty-one years or be married and in either of which events he declares "the houses and lots and stock are to be at her own disposal." Now, this power of disposal is a power of alienation, importing an absolute ownership repugnant to the limitation over and destructive of it. It cannot, therefore, be allowed to have any effect according to the principles and rules of law recognized by our courts in *Jackson v. Bell*, 10 J. R. 19, and cases subsequently decided.

As I have no doubt of the absolute ownership of Mrs. Ferris and of the ability of her husband herself to convey a good title to the defendant as a purchaser, I must decree a specific performance, with costs.

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[This and the three following cases embrace decisions of the Supreme Court and have been made during Mr. McCoun's present appointment as a justice of that court. They contain interesting equity principles and were handed by his honor to the reporter, with liberty to insert them in the present volume.]

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SUPREME COURT, IN EQUITY.

An exception in a deed is that which is severable from the thing granted. An inseparable incident does not amount to an exception.

It does not amount to a reservation where a benefit is given in a deed to persons not parties to it, and having no legal title and where nothing is reserved to the grantor. But there is an *intention*, to which the court will give effect according to the intent which is to be gathered from the whole instrument.

He who takes under a deed must perform all its express and implied conditions. His election precludes objection and becomes matter of estoppel *in pais*.

Deed of grant of a farm to a son in fee: "*excepting and reserving to my three daughters H., E. and R. a right of living on the said before mentioned premises as heretofore, so long as they shall respectively remain single.*" It appeared that prior to and when the deed was executed, the daughters lived with their father and were supported with the rest of his family on the farm and they so remained with the son (their brother, the grantee) until his death and they were still on the farm. In a partition suit, the question was as to the extent of their right or estate? *Held*, that the clause implied not only the mere being upon the premises but also subsistence, the means of living—a home. And the court pointed out how it could be provided for in a decree for sale and partition.

BILL filed for the partition of certain real estate in the town of Harrison, Westchester county.

The plaintiff was the widow of Jeremiah Maynard, deceased, who had devised to her (by his will) a life estate in one-third of his estate and to his three children who were infants, the residue of his property.

Three adult defendants, Rebecca, Hannah and Esther Maria Maynard, were the sisters of the testator Jeremiah

Aug. 8,
1848.

Deed.
Exception.
Reservation.
Intention.
Words.
Partition.

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Maynard; and they were made parties as having or claiming some interest in or lien upon the property sought to be partitioned.

Jeremiah derived title to the property by a deed from his father Elisha to him, bearing date the eleventh day of July one thousand eight hundred and thirty-five, founded on the consideration of natural love and affection and of one dollar. This deed conveyed by words of gift, grant, bargain and sale the lands described in it, together with all and singular the hereditaments and appurtenances. And the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and then followed these words:—"excepting and reserving to my three daughters, *to wit*, Hannah, Esther Maria and Rebecca a right of living on the said before mentioned premises as heretofore, so long as they shall respectively remain single and unmarried. Habendum all and singular the premises—"excepting as herein before excepted"—to the grantee his heirs and assigns, to his and their own sole and proper use, benefit and behoof for ever.

The case came up on pleadings and proofs. Sufficient of the facts and evidence appear in the opinion of the court.

Mr. *J. W. Mills*, for the plaintiff: 1. The reservation in the deed in favor of the three daughters is a mere right to live on the farm without a support. 2. Their remaining upon the place depends on the will of either Jeremiah or his father; and either of them had a right to determine its duration and enjoyment at any time, that is to say, Elisha had a right to determine it and so had Jeremiah as standing in his place. 3. The reservation has no effect or validity as conferring any right whatever.

These three daughters being strangers to the deed, take no interest by a reservation: 2 Blackstone, 299; Cruise on Real Property, book 4, p. 47; 3 Leonard's R. 60; Bacon's Abr. *Grant*, 395; 9 J. R. 73; 12 ib. 199. Even if it is a covenant, the reservation can only be claimed as an implied covenant to stand seized. All implied covenants are abolished: 1 R. S. (2d ed.) 731, § 140.

Mr. J. W. Tompkins, for the daughters. Three questions are involved: 1. Does the deed confer a right in or charge upon the lands in favor of the three daughters? 2. If it does, what is the extent of it? 3. Can the devisees of Jeremiah Maynard have a sale or partition in any way except subject to the right or claim of the three daughters?

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This court has jurisdiction to settle the rights of all the parties and to do justice between them. The spirit and intention of the deed is to be carried out fully as a matter of equity. The powers of the court are adequate: *Quick v. Stuyvesant*, 2 Paige's C. R. 84. The intention of the deed is manifestly to confer a support and not to make them mere tenants at will. The widow and children of Jeremiah Maynard are estopped from denying the practical effect which was given to the deed during his lifetime: 3 Wendell's R. 632. The court is to disregard technical rules of law and to give effect to deeds and wills according to intention. This deed was founded on natural love and affection for the daughters as well as the son. The legal effect of this clause in the deed is a covenant by Jeremiah to his sisters to give them a support; but if not, still there is an equity arising from it which this court will enforce: 1 Barb. Ch. R. 125; 2 ib. 194. The legal doctrine of a reservation to a third person being void has no application in equity. But, at this day, under the revised statutes, the old law is abrogated: *Jackson v. Swarts*, 20 J. R. 85; *Bleecker v. Bingham*, 3 Paige's C. R. 246. This clause is sustainable as a trust in favor of the daughters against Jeremiah as a trustee: § 55 to § 66 of the Statute of Uses and Trusts; of Powers, § 91 to § 108. Another view is conclusive: a charge or equitable lien is created for the daughters' support: 2 Barb. Ch. R. 194. Then, what is the extent of the daughters' interest in the property? It is not merely a possession, but a living or support: *Arthur v. Case*, 1 Paige's C. R. 449; S. C., 3 Wend. 632. What is the provision? A gift to the son and also a beneficial provision at the same time for the daughters. They claim to have the same comfortable support they were accustomed to receive in their father's house. This can be estimated and ascertained. The court can, by a reference, ascertain how much per year would be a fair

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support; and also what it will amount to, and so set apart as much of the proceeds of sale as will yield the amount annually so long as the daughters remain single, &c. The will of Jeremiah Maynard enjoins it on his widow and children to remain on the farm. This they disregard. If they would continue to hold the farm and live there, the three adults would also do so; but, since the widow chooses to sell, then money is to be allowed. But these defendants prefer to live upon the property and have a home there. There can be no right to turn them off even through a pecuniary compensation. The clause here amounts to an express covenant.

Mr. *Mills*, in reply. The idea is not a correct one, that here is a covenant binding on Jeremiah Maynard. There is no expression to that effect; and all implication is now forbidden. In fact, it is nothing more than an exception or reservation. It was revokable by the grantor in his lifetime. The father could have refused to furnish his daughters a support at any time. So could Jeremiah and so can his widow and children. But, admitting they have a right to live on the place, they have not a right to be supported there. The deed was made in July, 1835, and in September following the father made his will and gave each daughter three hundred dollars. The revised statutes have cancelled the doctrine contained in *Jackson v. Swarts*.

By the Court. McCoun, Justice:—The question is, what effect, if any, have the words in the deed in favor of the grantor's three daughters, and what rights have they acquired under the deed?

At common law, the words would have no force or effect as an exception, because an exception in a deed must always be of a part of the thing granted. It must be of something that already exists and not of any thing that is to arise or accrue afterwards. It cannot be of an inseparable incident, but must be of such a thing as is severable from that which is granted: *Shep. Touch. Prest. ed.* 78, 80; *Coke Litt.* 47, a. note (b.) Here, the thing granted is the farm composed of two distinct parcels of land. No part of the land is excepted; and the right reserved cannot be separated

from it. Hence, it is not strictly and properly the subject of an "exception." Nor is the clause in the deed effectual as a reservation according to the common law, for the reason that it reserves nothing to the grantor, but is made for the benefit of third persons who are not parties to the deed and who, in a legal sense, are strangers to it and to whom the deed does not profess in terms to convey any legal title: *Shep. Touch.* 80, 81; *Jackson v. Swart*, 20 John. R. 85; *Case v. Haight*, 3 Wend. 632. I think, however, the case is relieved from all difficulty arising from common law rules in respect to exceptions and reservations. The revised statutes having abolished the common law mode of conveyance by feoffment with livery of seisin and converted deeds of bargain and sale and lease and release into grants and, at the same time, abrogated the doctrine of implied covenants in conveyances of real estate and abolished uses and trusts except as therein expressly authorized and then having declared that "in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument and is consistent with the rules of law;" (1 R. S. 728, sec. 2,) the only thing the court has to do is to ascertain the "intent;" and when that is done, to carry it into effect, unless, indeed, the object and intention of the deed is to perpetrate a fraud or is against good morals or public policy or is forbidden by some positive rule of law. Now, looking into the deed in question, it is easy to perceive that the grantor, in making the conveyance of the farm to his son, not only intended to settle the property upon him by way of gift or advancement, but, at the same time, to make a provision out of it for his three daughters. The extent of that provision is another question. But, whatever it may be, the court is bound to give effect to the clause of the deed in which it is contained and to award to them the benefit of it according to the clear intention of the whole instrument: for, although the clause is not good as a technical exception or reservation, yet it is good as denoting an intention which is not inconsistent with the rules of law. There is, likewise, an-

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other principle which courts of justice cannot fail to recognize and which precludes the grantee in such a case as the present and those claiming under him from taking an objection to any part of the deed as being inoperative and void. The principle is this, "that no man can claim under a deed or will without confirming the instrument under which he claims; for, when he claims under a deed, he must claim under the whole deed together: he cannot take one clause and ask the court to shut its eyes against the rest." This was the language of Lord Loughborough in 2 Ves. jun. 676. And of similar import was that of Lord Roslyn as quoted by Lord Redesdale in 2 Sch. & Lef. 266, 267: "that no person puts himself in a capacity to take under an instrument, without performing the conditions of the instrument, and they may be express or implied. If it is stated or can be collected that such was the intention of the parties to the instrument, that intention must be complied with." (See also Stalman on Election and Satisfaction, 195.)

No person is bound to accept a gift or grant; but if he elects to accept, he is bound to comply with the terms or conditions on which it is given. His election once made precludes all objection on his part to the effect of the instrument according to its true meaning. It becomes a matter of estoppel *in pais*. The proofs in the cause show that Jeremiah, the grantee, accepted the deed. He held and occupied the farm under it until his death. His widow and children claim title under it at this time. They, indeed, have no other source of title to the property which is the subject of this suit; and are bound, therefore, to give effect to every part of the deed. Then, to the question of extent of the right claimed by the three daughters? As expressed in the deed, it is "a right of living on the before mentioned premises as heretofore, so long as they shall respectively remain single and unmarried." "Of living," this it is said imports a mere right of staying on the place or occupancy. But it imports more. It imports subsistence, the means of living, a home; and when we have the qualification "as heretofore," we are to look to the evidence of their manner of living on the farm before and at the time the deed was given. It is in proof that the father with his wife and his

three daughters and son Jeremiah, composing the family, moved from Delaware county and settled on this farm in the spring of the year one thousand eight hundred and twenty-eight. They resided there when this deed was executed in the year one thousand eight hundred and thirty-five. The daughters received their support from the farm in common with the other members of the family, performing, at the same time, the ordinary household duties of daughters in a family. They had no other means of support. Even after the deed was executed, the family continued to reside together without any apparent change in their household, Jeremiah being still one of the family; the father died in the month of May one thousand eight hundred and forty; and after his death the daughters and Jeremiah continued to live together in one family as usual. In the month of February one thousand eight hundred and forty-one Jeremiah Maynard married. After which the daughters resided by themselves in one part of the house, but continued to receive their support from the farm. In the fall of the year one thousand eight hundred and forty-five a conversation is proved to have taken place on the occasion of Jeremiah producing the deed and allowing it to be read for the information of his sisters, in which he fully admitted that he knew they were entitled to be supported from the farm and that he had never disputed it. He died in the month of September one thousand eight hundred and forty-seven, leaving them residing on the farm and where they still remain. It is proved that the eldest of them is forty-seven years of age, that the next is forty-two, and the youngest is forty-one years old. None of them have been married. From these facts it abundantly appears that the living they had been accustomed to receive prior to and when the deed was made was a comfortable support from the farm as members of the family residing upon it; and Jeremiah has given to their right its practical effect by allowing them to have, in his time, a home upon the place and the means of subsistence such as the farm was capable of yielding. This they will be entitled to receive so long as they remain unmarried—virtually, it amounts to a life

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estate *pro tanto* in the property. Possibly their right or the right of some of them may terminate sooner.

There are two ways of providing for it by a decree:—

First, To except it from the sale i. e. to sell subject to the right (taking it for granted that an actual partition cannot be made with propriety between the widow and children.) Second, To order a sale including the right and interest which the three daughters have in the property; and, in that event, to ascertain, by a reference, the annual worth or value of the support they are entitled to receive from the farm and, then, to set apart so much of the proceeds of sale to be invested in government stock or on bond and mortgage as will produce the amount.

The statute in relation to the partition of lands contains the proper directions for such decrees: (2 R. S. 325.)

The plaintiff may elect which form of decree to take.

BOGART and JACKSON, Executors, &c., Appellants and
VAN VELSOR, Respondent.

Executors were called to account in a surrogate's office by a widow of the testator having a present interest and acting on behalf of infant children; and at the time of bringing in their accounts they got a citation for creditors to attend a final settlement: *Held*, that—although this was going beyond the original application—the widow and creditors would be bound by it, but not the children, as there was not to be a distribution until they came of age.

Even where executors loan on real estate, they must use care as to title and ascertain that the value is such as will, in all probability, be an adequate security for repayment whenever the money shall be called in.

Criterion of value for executors in loaning on real estate is the estimate of men of ordinary prudence who would deem it safe to make a like loan with their own money.

Testimony of conversations which happened several years ago, is to be received with great caution; and especially when it comes from witnesses nearly related to a party in interest.

Good faith and honest intentions will not protect men in the performance of a

trust when they depart from prudential rules which the experience of others in similar transactions have approved as the only safe guides.

In construing a receipt which embraces several sums, the words with which it ends may be made to qualify the first sum and is not, necessarily, to be confined to the last antecedent.

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By the will of Cornelius Van Velsor, his widow Phebe Van Velsor and two infant children were interested in his estate. His executors were the present appellants Jacob Jackson and Andris Bogert. After a lapse of eighteen months from the time of the will being proved, the widow petitioned the surrogate of Queen's County (on behalf of herself and the children) that the executors should render their account. This was, accordingly, ordered. The executors presented their account; and, at the same time, obtained a citation from the surrogate requiring the creditors to attend the settlement. But the accounts of the said executors were objected to (at the time of presentation) mainly on the ground of an insufficient bond and mortgage made by Henry Horton in favor of the executors for securing \$800 and interest—another point had relation to the amounts of interest paid over by the executors to the widow.

October,
1848.

*Executor.
Mortgage.
Evidence.
Trust.
Receipt.*

This mortgage which the executors had taken was a second mortgage. Horton, the mortgagor, had given \$2300 for the property embraced by it, giving a first mortgage back for \$1300. This was in the year 1840. There was a foreclosure upon this first mortgage in the year 1843 and the property sold under it for only \$1100: so that nothing was made or had been paid upon the second mortgage taken by executors. It was proved that the executors were not present and did not attempt to protect the property on the sale in foreclosure. The widow insisted that they would have to make good the amount. The bond accompanying the mortgage had the name of George Duryea in it as a co-obligor; but it was only executed by Henry Horton. Testimony was taken before the surrogate. Among the witnesses were two of the sisters of the widow who deposed to conversations when she was said to have objected to the making of the loan of the \$800 to Horton. Another witness, *Abraham Van Wicklen*, who had land adjoining the mortgaged premises, deposed

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that he considered the latter worth what Horton gave for it at the time. This witness spoke well of the moral character of the mortgagor Henry Horton. He considered the second mortgage safe at the time. Farms had decreased in value considerably between the years 1840 and 1843. "If I had held the second mortgage, I would have bid it as high as eighteen hundred dollars before I would have let it went away." *William H. Jones*, another witness, after speaking of the executors as honest and men of good judgment, testified that a half or two thirds were loaned on the value of real estate. He should not have been willing to loan within \$200 of the value—and the taking of a second mortgage would be another consideration. "If the man was sober and industrious, I would let the amount loaned be nearer the value of the real estate than if he was not possessed of these qualities." *John L. Van Wicklen*, another witness: "Horton was reputed to be worth \$200 in money beyond his furniture, &c. I do not think on the foreclosure that Horton's place brought the worth of it. I know people who would have given more. I should have let Horton have had the \$800 if I had had it and no good place to put it out; but I would have depended on the man a good deal being sober and industrious." *Hewlett Valentine* affirmed that he was in the habit of loaning money on bond and mortgage. His rule was to loan about half of the value of the security; and if the man was good he would lend a little more. *Dr. Selah S. Carll*: "The executors informed me that he" (Horton) "had purchased the farm and was going to let him have \$800; knew there was a previous mortgage; supposed the investment was safe. Mr. Horton was very industrious and supposed he would get along and make the payment. He paid a little over \$2000 for the farm. Real estate has depreciated with us since 1840. Some farms have depreciated one third and one farm I know of has been sold and depreciated more than one third. It depends upon the location in some measure. I do not think now it would bring over \$1500, if that. I knew the amount of the first mortgage. I thought the investment was safe, relying on his, Horton's, character and on the farm conjointly. I do not suppose he had much, he was just out of his time and

was a steady, industrious young man ; have put out money on bond and mortgage, generally calculated on two thirds of the value of real estate ; prices had been inflated for a number of years and depression had not commenced therein in 1840 ; should not conceive it prudent to loan \$2100 on a place sold for \$2300. If I had had the money I don't know but that I should have lent it to Horton ; should have relied as much on Horton as on the land."

The surrogate, among other things, found as follows : " And the surrogate having deliberated on the said testimony doth decide and determine that the loss on the bond and mortgage of Henry Horton be charged to the said executors with interest thereon at the rate of five per cent. per annum from the twenty-first day of February one thousand eight hundred and forty-four, it clearly appearing from the testimony that ordinary care and prudence were not exercised in making the said loan, as is evinced by taking a second mortgage and for almost the purchase price of the farm mortgaged, against the wishes and remonstrances of the said Phebe Van Velsor."

The executors appealed.

Mr. *W. J. Cogswell*, for the appellants.

Mr. *W. S. Smith*, for the respondent.

McCOUN, JUSTICE :—The objection that the surrogate had not acquired jurisdiction to enable him to make such a decree as he has made, is not well founded. The application of Mrs. Van Velsor to have the executors "render an account of their proceedings" was the commencement of a proceeding within the surrogate's jurisdiction ; and upon being cited before the surrogate for that purpose it depended on the executors themselves whether the surrogate should do more than require them to render their account : 2 R. S. 33 (2d ed. sec. 60.) The rendering of an account and the settlement or adjustment of it after it has been rendered are or may be made distinct proceedings : *Westervelt v. Gregg*, 1 Barb. Ch. R. 469. It appears, in this instance, that the executors were desirous of having their account settled when

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rendered and, therefore, they prayed a citation for the creditors. In doing this, they invoked the jurisdiction of the surrogate beyond what the original application had done—they called on him to examine and pass upon their accounts and upon the claims of creditors. It is true that such adjudication might not be binding absolutely upon the children, nor the settlement amount to a final settlement with a view to an immediate distribution of the fund and a discharge of the executors, (the time for that purpose by the will not having arrived, the children being yet under age) but, as to the widow and the creditors, it would be final so as to bar all further claims of the latter and at the same time ascertain the amount of money remaining at interest or to be kept invested for the widow's benefit. The appellant, therefore, cannot now raise an objection to the surrogate's want of authority to make so comprehensive a decree as he has made in this case.

I proceed, therefore, to examine the other questions raised by this appeal.

The first is, whether the decree is erroneous in charging the appellants with the loss of the Horton loan? The reason for the decree in that respect is the inadequacy of the security on which that loan of eight hundred dollars was made. As a general rule, executors and trustees are not warranted in lending money of the estate on mere personal security, such as the bond or promissory note of the borrower. A court of equity will hold them bound to make good a loss sustained in such securities, because other and better, as government stocks and mortgages of real estate, are accessible to them as means of safe investment. But in lending money even on mortgage of real estate, a degree of care is necessary, which, if omitted, will render executors or trustees personally liable. They are bound to use ordinary care to ascertain that the title of the mortgage is valid and that the value of the property at the time of the loan is such as will, in all probability, be an adequate security for the repayment with the interest whenever the money shall be called in. The criterion of value in such cases is the opinion or estimate of men of ordinary prudence who would deem it safe to make a loan of the like amount of their own

money on the same property. Such men have adopted a rule (as the evidence in this case shows—and it is the only safe practical rule) not to lend more than from one half to two thirds of the value of the property mortgaged. If the appellants have followed this rule, they are not to be held responsible for a failure of the security. The proofs show that in the spring of 1840, Horton, the mortgagor, contracted for the purchase of the farm at the price of two thousand three hundred dollars; that he had two hundred dollars of his own money, which he paid on account of the purchase and, on taking the title in the fall of 1840, he gave his grantor a mortgage for thirteen hundred dollars as a first incumbrance and the balance of the purchase money he paid with the eight hundred dollars borrowed of the appellants and for which he executed to them a second mortgage accompanied by his bond; that in 1843, the first mortgage was foreclosed and the property was sold under it and was bought in by the person holding that mortgage for eleven hundred dollars, the appellants not attending the sale and no one in their behalf making a bid upon it. Now, supposing the property to have been worth two thousand three hundred dollars in 1840, (which, from the testimony—if not overrated—was the utmost value of it at that time)—the loans to be secure upon it should not have exceeded fifteen hundred dollars. The appellants thus acted without the ordinary care and prudence of money lenders when they loaned the eight hundred dollars in addition to the thirteen hundred dollars for which the property was already mortgaged. It is true that several of the witnesses speak of it as being in their judgment a safe loan at the time; but it is evident that they speak with reference to the good character, steady habits, industry and capacity of the borrower in the way of his trade—that of a carpenter—as furnishing a considerable portion of the security on which they were to rely; and it is more than probable likewise that the appellants felt the same confidence in his ability to work through and pay off the debt and trusted to that as much or more than they did to a forced sale of the property afterwards for their reimbursement.

This view of the subject is somewhat strengthened by a

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circumstance appearing in the case and which was urged on the argument as showing that the appellants, at the time of making the loan, placed not much confidence in the security of the mortgage, but intended to rely mainly on the bond, the bond having been drawn with the name of George Duryea inserted as a co-obligor and surety, though he did not execute it; and it appears he never was called upon or requested to execute it. If, then, they made a loan exceeding two thirds of the fair and reasonable value of the property relying upon the supposed ability of the borrower and the bond which he should give them, they must not complain if the law charges them with the consequences of a departure from established practice and compels them to take such unfortunate securities to themselves.

Another view of the case leads to the same result. The appellants did not attend the sale of the mortgaged property under the first mortgage: and took no step whatever to prevent a sacrifice of it. Though the testimony shows that property in that vicinity had declined in price very considerably from 1840 to 1843, yet it is difficult to believe that the property in question had so much depreciated in value as not to be worth something more than the first mortgage. One of their witnesses says, he thinks the property at the foreclosure sale did not bring the worth of it—and he knew people who would have given more for it. Another says, that if he had held the second mortgage he would have bid it as high as eighteen hundred dollars. Doctor Carll, their last witness, thinks it would now bring fifteen hundred dollars. It appears that only seven or eight persons attended the sale—and there was scarcely any competition or bidding. Under the circumstances, I cannot but think it was the duty of the appellants to attend the sale and, with the money of the estate remaining in their hands, to buy in the property, even to the amount of the first mortgage debt. On a resale they could have realized a portion, at least, of their own. No reason is assigned why they did not take that course. As second mortgagees they were bound to spare no pains to make their mortgage available. If, indeed, they had become convinced of the fruitlessness of any such effort, then they are placed in the dilemma of having

lent the money upon a grossly inadequate security of real estate and without the precautions which prudent money lenders would use in respect to the excess in value of the property over the amount loaned; thus, in effect, reducing it to the condition of a loan on the mere bond of the borrower—a consequence which imposes on them the duty of assuming the debt. This conclusion would be very much strengthened if the testimony of the two witnesses on the part of Mrs. Van Velsor, (her sister and her daughter) can be implicitly relied on. Testimony of conversations which happened four or five years before any thing occurs to call it forth is always to be received with great caution; and especially when it comes from witnesses so intimately and nearly related to the party in interest as these two witnesses are. But, making all due allowance for their bias and their liability to exaggerate or misconstrue what may have passed in the conversations alluded to, enough probably was said by Mrs. Van Velsor to put the executors on their guard in relation to lending the money of the estate to Horton. They, notwithstanding, deemed it safe to do so—honestly and in good faith they made the loan, but good faith and honest intentions will not protect men in the performance of a trust when they depart from prudential rules which the experience of others in similar transactions have approved as the only safe guides.

A point has been made by the appellants' counsel on the argument, that because they would have been justified in lending to two thirds of the value of the property they ought to be charged with only so much of the debt as exceeds that standard, which would be about six hundred dollars. It is a sufficient answer to this proposition to say that if the appellants have been so indiscreet as to lend on the property six hundred dollars more than they ought to have loaned, they have been equally indiscreet in omitting to buy in or to redeem from the first mortgage, by which they have suffered a loss to the estate of the other two hundred dollars.

The only other point made and insisted on by the appellants' counsel on the hearing of the appeal is that the decree is erroneous in charging the appellants with ninety-six dollars and seventy-six cents for interest which accrued previ-

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ous to the twenty-first day of February 1844 as still due and unpaid to Mrs. Van Velsor. The executors appear to have been somewhat careless in the manner of taking receipts for payments of interest made to Mrs. Van Velsor from time to time and in not keeping a regular account of all such payments.

It would seem, from Doctor Carll's testimony, that having the notes in his possession given by the two executors for the money in their hands respectively, on which they paid interest to the widow, he has paid over to her interest money. How much or when particularly he does not say, but it must have been before the twenty-first day of February 1844; and for which no voucher or receipt has been produced. The receipts produced are for payments of interest made directly by the executors themselves to the widow, and the one most relied on as showing the erroneousess of the decree in charging them with back interest is the receipt given by her to Mr. Bogart, specifying three different sums paid—viz: "Twelve dollars on account of interest on Horton's bond and thirty-one dollars and twenty five cents as interest on Jacob Jackson's note and three dollars and thirty cents as interest due on A. Bogart's note in full up to the first day of May 1844." Now, there is no reason why the concluding words "in full, &c." should not as well apply to the interest paid on Jackson's note as to that of Bogart's—both sums are expressed to be paid "as interest." And the interest on each note seems to have been calculated up to the particular day specified—hence the twenty-five cents in one payment and the thirty cents in the other. Besides, there is the strong probability that, acting as they did together and in concert, both paying interest at the same time on their respective notes, both would pay the interest in full. Hence the receipt is to be understood as evidence of payment in full to the first day of May 1844, of interest on the two notes. Taking that fact to be established, there is then only the Horton debt of eight hundred dollars on which any arrears of interest could be due. This, for the whole time from the twenty-first day of December 1840 to the twenty-first day of February 1844 amounts to one hundred and fifty-two dollars. From this sum, deduct the payments clearly appearing to

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have been received by Mrs. Van Velsor as interest on this bond debt—viz : say thirty-five dollars for its proportion of the ninety-eight dollars and twenty-seven cents paid for interest on the whole twenty-three hundred dollars May 2d 1841 and forty-eight dollars being one year's interest on the eight hundred dollars received by her on the 4th October 1843 and the twelve dollars included in the last receipt, and there would remain but fifty-seven dollars or thereabouts for arrears of interest, instead of the ninety-six dollars and seventy-six cents mentioned in the decree.

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But I am not satisfied to charge the appellants with any arrears of interest in the face of that receipt. The words "in full" &c. in my opinion may be extended to the interest money then paid on the Horton bond as well as the notes. It is true the receipt declares the twelve dollars to be on account of interest on Horton's bond : it might be on account and yet be in full—and there is no expression showing there were still arrears or that the payment was on account of arrears of interest. The words "on account" as therein used may be controlled in their meaning by the subsequent words "in full up to the first day of May." In *Areson v. Areson*, 3 Denio, 458 (in the court of errors,) it was held that words at the end of a clause in a will were not to be confined in their application to the last antecedent, but should be allowed to qualify all that had preceded in the same sentence or clause. That principle seems applicable here.

The decree of the surrogate must be reversed in that part of it which directs the appellants to pay the ninety-six dollars and seventy-six cents as and for interest which had accrued the first day of February 1844. In all other respects the decree is affirmed. Such being the result of the appeal, each party must be left to bear their own costs of it.

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SUMMERS v. BURTIS.

A testator gave to his wife during widowhood the use of all the houses and lands that he thereby gave to his daughter J. W : "*Item, I give unto my beloved daughter J. W. my house and lot of land where I now live, which she is to have after her mother's decease or day of marriage, bounded as follows* (describing them by metes and bounds) *containing within said bounds 20 acres more or less. Also one piece of woodland lying near N. bounded* (describing it likewise by metes and bounds) *containing within said bounds 10 acres more or less to her and her heirs for ever after her mother's decease or day of marriage.*" The question was whether the daughter took a fee or life estate in the house and lot as well as in the woodland. *Held*, that she took a fee in both; that there is but one gift although there are two properties and the words "*to her and her heirs for ever*" apply to both of the latter.

Neither of the words *assigns* nor *for ever* are necessary to carry a fee. The word *heirs* alone will secure it.

BILL FOR SPECIFIC PERFORMANCE.

Oct. 21,
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*Specific
perform-
ance.*

Will.

Words

"Heirs."

"Assigns."

*"For
ever."*

JOHN WEEKS, the father of the plaintiff, died prior to the seventh day of April one thousand seven hundred and eighty-one seized in fee simple of a certain house and lot of land (containing about twenty acres) in the occupation of the plaintiff and also of a piece of woodland of ten acres, all in the town of Oysterbay in the county of Queens. He had made his will, attested so as to pass real estate. In it he bequeathed to his wife Rebecca Weeks "the use of all the houses and lands that I give to my daughter Jane Weeks, during her widowhood, and all my household furniture," &c. "all which I give to her in lieu of her right of dower. *Item, I give unto my beloved daughter Jane Weeks my house and lot of land where I now live, which she is to have after her mother's decease or day of marriage, bounded as followeth* (*giving metes and bounds*), *containing within said bounds twenty acres more or less. Also one piece of woodland lying near Norwich, bounded*" &c., "*containing within said bounds ten acres more or less, to her and her heirs for ever after her mother's decease or day of marriage.*" *Item, I give unto my son Augustine Weeks and to his heirs and assigns for ever that piece of meadow ground and swamp bounded*" &c.

That Rebecca Weeks, the widow of the testator and the mother of the plaintiff, died in the month of March one thousand eight hundred and one.

The plaintiff and the defendant, on the sixth day of April in the year one thousand eight hundred and forty-eight, came to an agreement in writing for the sale and purchase of the house and lot devised as aforesaid to the former.

The defendant, under the advice of counsel, declined to accept the deed and refused to comply with his agreement, raising questions against the title—a principal one was whether the plaintiff was seized in fee under the will of her father.

A written stipulation had been entered into between the attorneys in the cause that no testimony be taken and that the court should only take the single question of the validity of the plaintiff's title under her father's will?

Mr. *William S. McCoun*, for the plaintiff.

Mr. *Edwards Pierpont*, for the defendant.

The Court. MCCOUN, JUSTICE :—On the sixth of April one thousand eight hundred and forty-eight an agreement in writing was entered into between the plaintiff and the defendant in this suit, by which the former agreed to sell and the latter agreed to purchase a tract of land in the village of Oysterbay in the county of Queens, at the price of sixty-five dollars per acre, which, upon a survey, was found to contain about twenty-four acres and a half. On the twelfth of May one thousand eight hundred and forty-eight the plaintiff tendered to the defendant a deed, conveying the land to him; and which contained the usual full covenants of seisin and warranty. This deed the defendant, under the advice of counsel, refused to accept, on the ground of a doubt in regard to the plaintiff's having a title in fee to the property.

The bill is filed in this cause to compel a specific performance of the contract. It sets forth the will of John Weeks the father of the plaintiff, dated the thirteenth day of March one thousand seven hundred and eighty, executed
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in due form of law to pass the title to real estate ; and also the death of the testator, sometime between the date of the will and the seventh day of April one thousand seven hundred and eighty-one, when it was proved in the surrogate's office. The plaintiff insists that, by the will, she has an absolute estate in fee in the land which she contracted to sell.

The defendant, by his answer, raises the question, whether she has anything more than a life estate ? The cause has been heard on the bill and answer and a stipulation between the respective solicitors, presenting that single question.

By the will, the testator, in the first instance, gives to his wife Rebecca, during her widowhood, the use of all the houses and lands that he thereby gives to his daughter Jane Weeks. The will then proceeds as follows :—" *Item*, I give unto my beloved daughter Jane Weeks my house and lot of land where I now live, which she is to have after her mother's decease or day of marriage, bounded as follows" (describing it by metes and bounds) "containing within said bounds twenty acres more or less. Also one piece of woodland lying near Norwich, bounded," &c. (describing it likewise by metes and bounds) "containing within said bounds ten acres more or less, to her and her heirs for ever, after her mother's decease or day of marriage." It is admitted that Jane Weeks, the above named devisee and Mrs. Summers the plaintiff are one and the same person ; and that the homestead described in the will as containing twenty acres more or less comprises the premises which were the subject of the sale to the defendant ; and that her mother, Rebecca, the testator's widow, died in the year one thousand eight hundred and one, since which time the plaintiff has been in the actual possession and enjoyment of the property.

The devise to the plaintiff by this will is the devise of a remainder both in the homestead and the wood lot—that is to say, it is an immediate gift to her, but she is only to take and have the actual possession of the property at the expiration of the particular estate which is given to the mother to be first enjoyed by her during widowhood. But what

estate in remainder does the plaintiff take? Is it a fee—or, only for her life?

This question depends entirely on the application and meaning of the words "*to her and her heirs for ever*:" for they are clearly words sufficient, in law, to carry the fee or absolute ownership in the property to which they relate to the person named as devisee. The only point of inquiry here is, do the words apply to the devise of the homestead or is their application confined to the gift of the ten acres of woodland? In order to ascertain this point, we have only to look at the devising clause of the will in which they occur. Both pieces of property are given by one and the same devising clause. It begins thus: "*Item, I give unto my daughter Jane my house and lot of land where I now live, &c. Also one piece of woodland*" &c. There is no reiteration of "*Item, I give*" as immediately connected with the ten acre wood lot. There are not, in fact, two separate gifts. There is but one gift, though it be of two separate and distinctly described pieces of land; and there can be no doubt of the testator's intention to give them both in the same manner and to be held by the same tenure. Therefore, the words "*to her and her heirs for ever*" are as clearly and emphatically applicable to the gift of the homestead as they are to the woodland; and in relation to both they carry the fee beyond all peradventure. I have looked into the authorities which were cited by the defendant's counsel on the argument and cannot discover that they have any bearing on the point immediately involved. They are cases which only go to show that, if there were no such words as *to her and her heirs* in the devise, Mrs. Summers would take but a life estate.

My attention has been called to the circumstance in this will, that the devise to the testator's son Augustine, immediately following that to his daughter Jane, is expressed to be to him "*and to his heirs and assigns for ever*;" and it is suggested, whether omitting to use the word "*assigns*" in the previous clause, the testator did not intend to qualify the gift to her in some way, instead of giving a fee simple, as he did to Augustine. Indeed, the suggestion has been carried so far as to suppose that he may possibly have intended

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to include her children under the description of "heirs" and to make them partakers with her of the property, creating a joint tenancy or a tenancy in common between her and them. There is not the least color in the law for giving any such construction or meaning to the word "heirs." That word does not denote that her children are to take any thing under this will in the character of devisees. Nor are the words "to her and her heirs" of any less effect in passing the fee and of enabling her to sell and dispose of the property than if it had been expressed "to her and her heirs and assigns for ever." The words "assigns" and "for ever" are neither of them necessary to the conveyance of an estate in fee—and when the limitation is extended to *heirs* generally, the grantee or devisee has an estate in fee simple, although the word "assigns" and the words "for ever" be omitted: 2 Preston on Estates, 3.

In no view of this case can there be a doubt of Mrs. Summers's entire and absolute ownership of the property under the will of her father and of her competency to convey a good title to the defendant. She is, therefore, entitled to a decree for a specific performance of the contract.

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ISAAC C. FROST v. CHARLES FROST, impleaded with WILLIAM FROST and TAMER FROST, Widow, &c.

A bill gave C. F. two-thirds of a farm and left to executors the remaining one-third on a trust, subject to a widow's life estate; and directed C. F. and the executors to pay S. F. a legacy of \$800 (and two small legacies) in proportion to the shares of land devised. Also, that if C. F. neglected to pay his proportion, the executors were to sell sufficient to pay. And there was a provision for partition on the mutual consent of widow, executors and devisees. The partition took place; and C. F., at the instance of the acting executor, gave his bond and mortgage (to such executor) on the two-thirds of land set apart to him, to secure as well the widow her share of the life estate as the proportion of legacies payable by him to the next of kin of S. F. (the legatee, who had died). After this, the widow died; and, then, C. F. paid the executor his proportion of the legacies and the mortgage was cancelled. At this time there was no legal representative of S. F.; and his only child and next of kin was a minor. The executor became insolvent and the legacy was lost. *Held*, that it was competent for the executor to take the bond and mortgage; and that the payment to him under them was sufficient payment by C. F., of his proportion of the legacies.

*Also held*, as the present action, by S. F.'s next of kin, for such proportion of the legacy of \$800, was not commenced by the legatee's next of kin until six years after the death of the widow of the testator or of the grant of any administration to S. F.'s widow or of the coming of age of such next of kin, that the statute of limitations applied.

THIS was a suit brought by the plaintiff, Isaac C. Frost, as sole next of kin of Stephen Frost, deceased, to recover in that capacity and in right of his father his proportional part of a legacy left to the latter in his lifetime by the will of his grand-father.

The widow and administratrix of Stephen Frost had refused to be a plaintiff and was made a defendant.

Facts appear in the opinion of the court.

The cause was tried at a special term of the supreme court in Queens County.

Charles Frost only had appeared and set up a defence.

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 Payment.
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The main question was as to payment and the point of the statute of limitations.

Mr. *Burrill* and Mr. *H. G. Onderdonk*, for the plaintiff.

Mr. *W. J. Cogswell*, for the defendant Charles Frost.

Per Cur. MCCOY, JUSTICE.—Two grounds of defence are taken by the defendant Charles Frost. First, payment; and, secondly, the statute of limitations.

The payment proved was made by this defendant to Edmund Frost, the executor, by means of a bond and mortgage executed by the former to the latter on the thirtieth day of April one thousand eight hundred and thirty; and which was paid on the seventh day of January one thousand eight hundred and thirty-eight. If the will authorized the payment to be made through the executor or constituted him the recipient as between the defendant and the legatee or his representative, then, the payment which has been made is a good one and the defendant is not liable to pay the money a second time. The will devises to the defendant two-thirds of a farm; and left to the executors the other third in trust for the use of William Frost, another son of the testator. These devises were made subject to an estate for life or during the widowhood of the widow. The will then directs Charles (the defendant) and the executors, on behalf of William, to pay to Stephen the legacy in question of eight hundred dollars and two legacies of one hundred dollars each to other persons. These several legacies were payable in proportion to the land devised *i. e.* two-thirds by Charles and one-third by the executors in behalf of William. Then follows this provision: that if Charles shall neglect or refuse to pay his proportion of the legacies, the executors are to sell as much of the land as will pay it. Here is, also, this further provision in the will that, notwithstanding the use of all the estate is given to the wife for life or during her widowhood, if she with the executors should agree to have a division of the estate made before her death, then, the executors are authorized

to act in making such division; and they were to take especial care that she was provided with necessary accommodation and maintenance. Edmund Frost was the only executor out of three who qualified and acted. It appears that on the fourth day of April one thousand eight hundred and thirty, the widow having agreed to give up her life estate in the farm for an equivalent proposed to be secured to her, an arrangement was made between the executor, acting for the widow and, also, for William and the defendant Charles, by which a partition of the farm was effected; and one-third was set off for William's use and the other two-thirds as directed by the will were set off as belonging to Charles. And that this being done, Charles, then, at the instance of the executor and on the twentieth day of April one thousand eight hundred and thirty, made and executed his bond, to and in the name of the executor, in the sum of two thousand five hundred dollars and, also, a mortgage on the portion of the farm which had been set off to him to secure the payment of the bond according to its condition: which was, to pay to the executor a yearly interest on the two thousand five hundred dollars of not less than two *per cent.* nor more than four *per cent.* to be determined by the executor until the obligor should pay his two-thirds of the legacies, viz.: the sum of six hundred and sixty-six dollars and sixty-six cents and when that amount or any part of it was paid, the interest on such amount was to cease; but the interest on the remainder of the two thousand five hundred dollars should continue to be paid during the natural life of the widow, to be applied exclusively for her comfortable support and maintenance; and the further condition of the bond was to pay to Edmund Frost, the executor or to such person or administrator as should be duly authorized by law to receive it for the benefit of the heir of Stephen Frost, deceased, and to the other legatees named, the obligors full proportion of the legacies, &c. according to the true intent of the will. Stephen had died in the year one thousand eight hundred and twenty-seven, which was previous to the giving of the bond. The testator's widow did not die until the month of April one thousand eight hundred and thirty-seven; and the interest money was paid and applied

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to her use while she lived. In the month of January one thousand eight hundred and thirty-eight the principal sum of six hundred and sixty-six dollars and sixty-six cents (being two-thirds of the legacies and all that the defendant was bound to pay) was paid by him to the executor; and the bond and mortgage were given up and cancelled. During all that time there was no legal representative of Stephen Frost and the plaintiff, his only child, was minor of about nineteen years of age. Tamer, his widow, did not take out letters of administration on his estate until afterwards. She has refused to be a plaintiff in this suit and is, therefore, made a defendant.

Now, the question presents itself, whether the executor had authority by the will to make the arrangement and to take the bond and mortgage?

So far as the widow's rights and interests were concerned, it is clear that he possessed the authority. On her agreeing to relinquish the farm and to allow it to be divided between her two sons (the remaindermen) it was expressly made the duty of the executor "to act therein" and to see that something in the way of an equivalent was secured to her. Hence, that part of the bond which produces an income for her was such as his duty required him to take. So, with respect to the legacies. In case of the defendant's "neglect or refusal" to pay his proportion of them, the executor was expressly authorized and directed to sell so much of the land as would pay it. It was optional with the defendant, as it is with every devisee, whether he would accept the devise *cum onere* or reject it. His objection would be a refusal within the meaning of the will; and the executor in that case would be left to exercise his power of sale. If he accept the devise (and his acceptance would be evidenced by his entry upon and use of the land as owner) and should afterwards fail to pay his proportion of the legacies when they became payable, such failure or omission would be a neglect on his part, which might, in like manner, authorize the executor to resort to a sale of the land.

The power or authority conferred on the executor in either case required a corresponding duty on his part. A duty to ascertain whether there would be a refusal by the defen-

dant's non-acceptance of the devise or a neglect growing out of his acceptance and a failure afterwards to comply with the terms of the will. On ascertaining, as he did, the defendant's willingness to accept the devise and to enter into an arrangement for the partition and possession of the farm and thereby to assume a liability to pay a proportionate part of the legacies, it was competent for the executor—and I think fairly within the line of his duty—to take from the defendant a bond embracing that as well as the interest for the widow.

The giving of the bond and mortgage was, therefore, only a compliance with what the executor had the power to require, viz. an assurance against both the defendant's neglect and refusal to pay. It is no objection to this mode of arranging for the payment that the money was thereby made payable to the executor. The will made it his duty to see to the payment. Had he been left to the exercise of his power of sale, the money must have come into his hands, unless the legatees, from a well founded apprehension of his insolvency and danger to the fund, had taken measures to prevent it. The giving of the bond has accomplished no more than might have been accomplished without it; and its existence deprived the legatees of no right they had to prevent the money going into the hands of the executor if they had so desired. It is true that, had the defendant paid the money directly to the legatee or his legal representative instead of paying it into the hands of the executor, it would have been a good payment; but, unfortunately, Stephen was dead and there was no legal representative of his estate at the time the money became payable. It is stated that his widow did not take out letters of administration until the second day of May one thousand eight hundred and forty.

There is no evidence of any collusion between the defendant and the executor or any want of the most entire good faith in the whole transaction; and though the money may have been lost by the subsequent insolvency and death of the executor, the loss is rather ascribable to the extraordinary power conferred on him by the will, than to any fault

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of the defendant who paid the money honestly and fairly without any sinister or fraudulent purpose.

But, lest I should be mistaken with regard to the effect of the payment made to the executor, I will examine the other ground of defence, viz. the lapse of time. When did the right or cause of action accrue for the recovery of this money? The time from which to date the right of action most favorably to the plaintiff is, the widow's death, which occurred in the month of April one thousand eight hundred and thirty-seven. Then it was that the defendant would have been entitled, at all events, to be let into possession of his part of the farm; and from the time of his taking possession under the will his liability to pay became fixed. This corresponds with the time of payment mentioned in the condition of the bond. We are speaking, however, of the liability irrespective of the bond and mortgage and as if those instruments had never existed.

It was a liability which attached to the person in virtue of the property devised and became binding in law as for a debt contracted. The land, also, stood charged for its payment.

And what was the remedy to be pursued by the creditor or legatee for enforcing payment? I mean the remedy which the courts of justice could furnish and not the exercise of the executor's power of sale. Doubtless, a bill in equity would have been an appropriate remedy; but this is not a subject matter over which a court of equity has or had "peculiar and exclusive jurisdiction;" for I consider that a court of law had concurrent jurisdiction by action at the suit of the legatee or his legal representative to enforce the payment of this money by judgment and execution in the usual form. Here was a devise of specific real estate charged exclusively with the payment of a sum certain. There could be no right, in any event, to look to the personal property or general assets of the estate for payment. No question could arise about marshalling assets or the abatement of legacies. The executor's assent was not necessary; nor was he a proper party to any suit for its recovery. The devisee enters upon the possession and enjoys the property, assuming to be the owner to all intents and

purposes. Now, nothing more is wanted to enable the legatee to recover in an action of *indebitatus assumpsit* against the devisee, except a promise to pay. Courts of law have required evidence of an express promise, but this evidence has not been confined to the speaking of words of promise. The party's acts are admitted as evidence of a promise. In *Beecker v. Beecker*, 7 John. R. 99, an action of assumpsit was sustained against a devisee, upon his promise to pay a specific sum bequeathed as a legacy and charged on the land devised, &c. On a motion in arrest of judgment, the court held that after verdict an express promise was to be presumed. But Kent, Ch. J. in deciding that cause, refrained from giving any opinion on the point whether the action could be sustained without evidence of an express promise. In *Van Orden v. Van Orden*, 10 John. R. 30, the same court afterwards held, in an action against a devisee for an annuity, that the acceptance and enjoyment of the estate devised and an actual payment of part of the annuity by the devisee were conclusive evidence of and equivalent to an express promise to pay and entitled the annuitant to recover. So in *Kelsey v. Deyo*, 3 Cowen, 133, which was a similar case and where there was no direct evidence of a promise to pay, but payment had been made, from time to time, on account of the legacy. Ch. J. Savage held that, from such facts, an express promise to pay might be inferred; and the plaintiff had judgment. *Tole v. Hardy*, 6 Cowen, 333, is another case of like import; and, moreover, shows when the jurisdiction of a court of law may be invoked and when, from the manner in which the legacy is charged, so as to affect both real and personal estate, recourse must be had to a court of equity. In the present case, as I have already shown, the legacy is not so charged as to affect any other property, except the specific real estate devised to the defendant; and so far as evidence of a promise to pay it might be required to sustain an action at law within the principle of the cases cited, that evidence would be found in the act of the party in giving a bond and mortgage which embraced the payment of the legacy and which would be deemed by a

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court and jury a full and complete assumption of it as a debt.

This, then, being a case of concurrent jurisdiction in a court of law, the statutory limit of six years applies to it: 2 R. S. 301, sec. 49.

The six years began in April one thousand eight hundred and thirty-seven, when the right of action, if any, arose. The right to call for payment at that time and to sue, if necessary, belonged to an administrator. The delay in taking out letters of administration by Tamer Frost, the widow, was no suspension of the right and produced no such disability to sue as the statute recognizes. Nor is it any objection to the operation of the six years limitation that the plaintiff in this case was not in a position or condition to proceed at law for the money. A court of equity only could afford him relief such as he seeks to obtain in this action; but, still, the right existed in favor of the person legally entitled and if not insisted on and enforced within the time allowed by the statute, it became barred and the defendant's liability extinguished as to every body. It is conceded that this action was not brought within six years of the time when the legacy became payable or of the grant of administration to the widow or of the plaintiff's becoming of age. The statute, therefore, is a perfect protection to this defendant.

If the plaintiff, as the sole heir and next of kin of his father the legatee, has suffered pecuniary loss by the neglect or refusal of the administratrix to take proper measures in time to obtain the money in question, either from the defendant Charles Frost or from the executor or by preventing its going into the hands of the latter, he has a claim over against her, provided that, also, is not barred by the lapse of time.

I do hereby render judgment for the defendant Charles Frost, dismissing the complaint as to him, with costs. But, inasmuch as no defence has been made to this action by or on behalf of the defendant William Frost, the plaintiff is entitled to judgment against him for his (the plaintiff's) distributive share (being two-thirds) of the one-third of eight hundred dollars which was to have been paid out of that

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portion of the farm devised and set off for the use of William. There may be a reference to the clerk of Queen's County to compute the amount of the plaintiff's distributive share, with interest upon it at six per cent. per annum from the time of the testator's widow's death. And on the filing of the report, judgment to be entered for that amount, with costs as in cases of judgment by default and execution to be issued on the judgment, to be levied on the lands devised to and set apart for William.

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ACKNOWLEDGMENT OF DEED. See DEED, 1.

AGREEMENT.

1. Since the revised statutes, a contract for the sale of lands is not complete unless the seller (personally or by agent lawfully authorized) subscribes the contract. A contract, signed or subscribed by a buyer only, cannot be enforced : the statute requires the seller to sign and is silent as to the purchaser. *Miller v. Pelletier*, 102.
2. A landlord agrees to let premises for a year upon the proposed tenant's giving J. C. as security for the rent by the first of February and the tenancy to commence on the first day of May thereafter. The proposed tenant, who is already in under a former tenant, does not give the security by the day fixed, but offers another party who the landlord does not take and also offers S. C. a few days afterwards. The difficulty in getting J. C. is alleged to have been caused by the absence of a friend who was to have secured such suretyship : *Held*, that time was of the essence of the contract and the day having gone by, the landlord could not, then, be compelled to give a lease or receive J. C. as surety. *Mitchell v. Wilson*, 697. .

ALIEN.

1. *It would seem*, that the provision requiring aliens to take incipient measures and to file affidavit before holding lands (1 R. S. 720) does not abolish the common law right of an alien to take by purchase. *In the matter of Leese*, 395
2. The government alone can take advantage of an alien's disability to hold lands. *Ib.*
3. An officer of the court who, under its decree, holds a suitor's property by conveyance, has no right thereunder to raise objections to the suitor's title ; and, therefore, has no business with a question of his alienism. *Ib.*

ASSIGNMENT FOR CREDITORS.

1. If an assignee to pay debts allows the debtor to act as his agent and receive large compensation therefor, he will have to account for the amount to creditors, on a bill filed in behalf of all of them. *Redmond v. Wemple*, 221.
2. N. G. C. owed the Manhattan Co. ; and on the 15th December, 1836, gave them his bond and mortgage on real estate. On the 12th March, 1841, they foreclosed, sold and bought in ; and there was a deficiency for which (under a transcript of their decree) they issued a *f. fa.* which was returned *nulla bona*. On the 9th of October, 1838, the said N. G. C. had made a deed of trust, embracing the mortgaged premises, upon trust for the trustee to sell subject to mortgages or free from incumbrances and paying them off out of purchase money and in the mean time collect rents ; and after payment

of taxes and other ordinary charges, upon trust to pay, first, The Greenwich Bank a specified sum; and, afterwards, certain other creditors. The trustee collected and held rents; and the Manhattan Company now filed their bill, claiming them to make up the balance due them under the foreclosure. *Held*, (on a general demurrer interposed) that the rents which the trustee received were not a trust fund to keep down interest and that they belonged to the Greenwich Bank and should be paid in part of their debt. *Manhattan Company v. Greenwich Bank*, 315.

And see, MORTGAGE, MORTGAGOR, MORTGAGEE, 1; DEBTOR AND CREDITOR, 3.

ASSOCIATION. CORPORATION.

1. A court of chancery can interfere to protect and enforce the trusts of an assignment made by a company incorporated in another state while the person or property to be acted upon is within the jurisdiction. *Barclay v. Talman*, 123.
2. And this might be done at the instance of a creditor provided for in the assignment or by shareholders where they are to have an express benefit under it. *Ib.*
3. Where an incorporated company makes an assignment for creditors and no event has occurred giving shareholders any express benefit under it and its charter has not become surrendered, invoked or invalid, the shareholders cannot file a bill (which recognizes the assignment) to restrain the assignee in relation to the properties assigned. A voluntary assignment by a corporation or its insolvency or the non-user or misuser of its charter may lay the foundation for a direct application to vacate it; but, until the proper public officer of the state creating the corporation acts and a judgment or decree of a proper tribunal is had, the corporation remains for all the purposes of its creation and with all the legal capacity it ever possessed. *Held*, therefore, that where an incorporated company of Maryland had assets in New York and made an assignment in Maryland, in which one of the trustees under it resided within the jurisdiction of this court, the shareholders could not file a bill, while the charter was outstanding, which recognized the trust and yet asked the court to restrain the trustees on the grounds that there was mere virtual dissolution and that the assets had become an equitable trust fund. The shareholders should first proceed in Maryland to dissolve the corporation. *Ib.*
4. Where an act is done by a company pursuant to a resolution of a board of its directors at a meeting not objected to by its officers at any time, the mere regularity or irregularity in the convening of that board will not be an objection to the act done. The power to do the act is another question. *Leavitt v. Yates*, 136.
5. An association, under the general banking law, may borrow money to discount notes and also to purchase state stocks and other securities to be deposited with the comptroller; but it has no right to borrow money to be used in speculations or in mercantile or other business having no relation to the ordinary business of a bank. *Ib.*
6. Directors of a company are but agents for the benefit of others. *Ib.*
7. If an association under the general banking law has made extensive operations of a speculative character in state stocks and, thereby, become greatly embarrassed, it cannot raise funds by an issue of its notes or obligations, secured by a pledge or assignment in trust of its remaining assets, in order to satisfy creditors whose demands have not grown out of legitimate banking business. It may be different where the demands of existing creditors grow out of legitimate banking business and provided the money expected to be raised is necessary and intended to be applied to discharge *bona fide* debts of that character. And where such a pledge and an assignment in trust has been made, and it is difficult, before proofs have been taken, to discriminate between the character,

bona fide, and the legitimacy of the claims of creditors thereunder, it is the duty of the court to grant an injunction and appoint a receiver. *Ib.*

8. An unlawful transaction is not to be upheld merely because there has been honest intention and good faith in those who caused it. It must be judged by law and not by motive. *Ib.*
9. On the 15th of December, 1840, the North American Trust and Banking Company is sued 800 promissory notes, all of the same date, payable thirteen months thereafter, in favor of their clerk, who indorsed them, not for the purpose of adding anything to their security, but to give them currency without further trouble. Four hundred of them being \$500 each and the remaining four hundred for \$1,000 each (amounting in the aggregate to \$600,000.) At the foot of each note was this memorandum: "The payment of this obligation, with others, amounting in the aggregate to \$600,000, is guaranteed by the transfer of securities estimated at \$600,000, under a deed of trust executed between the company and H. Y., T. G. T. and W. C. N. Trustees, bearing even date herewith." These notes were delivered out principally to directors and agents to raise money and bring it into the association. *Held*, that these notes had so far the character of circulating notes as to be within the restraining law of 1830, (1 R. S. 712) and the act of May 14, 1840, and were consequently illegal. Also that they were void from the fact that they were not based on the pledge of securities with the comptroller nor intended to be countersigned and registered as required by the banking law. Likewise that, the notes being void, the accompanying trust deed, made for their security and payment, had no legal effect and was void. *It would seem* also that such trust deed was fraudulent in law as tending to hinder and delay creditors. Still it might be that creditors dealing with the company in legitimate banking business and induced to accept some of these notes on the strength of the trust, at the same time relinquishing other securities, would be remitted to their original rights and securities. No protective equity, however, attached in favor of parties on the ground of their having bought and paid for exchange or made loans or advances of money or assumed liabilities for the company or given up its certificate of deposit on the strength of having received, as security, the notes and the trust merely on the faith of the security the latter was intended to afford. But, if the parties, on taking the notes, had been expressly promised or had expressly stipulated for a pledge or hypothecation of bonds and mortgages or other securities, as collaterals, (the notes proving to be illegal and void) they might insist on a fulfilment of the stipulation in respect to the pledge by way of equitable mortgage; and the court, on proof, which must not be feeble, would compel a restoration as a condition of annulling the new security. *Ib.*
10. And, on this latter principle, where a *bona fide* creditor of the association had had bonds and mortgages assigned to him as security and was encouraged to give up such bonds and mortgages and take some of the said notes embraced by the said trust deed on an urgent assurance from the president (and he being shown a written opinion of the counsel of the association) that such notes were valid and well secured by the trust deed and the said bonds and mortgages still remained as part of the assets embraced by the said trust and had not been passed away: *Held*, that such creditor (the court deciding against the trust deed) was entitled to a restoration of the bond and mortgages. *Ib.*
11. Where a trust deed, made by a banking association with a view to protect the holders of its certificates, is set aside, a holder who was induced to take some of them and give up bonds and mortgages which the association had before transferred to him as security for indebtedness, and this was done at the request and upon the earnest assurance of the association of the validity of such trust deed and certificates and an opinion

- of counsel was shown by way of further inducement: *Held*, that the holder was, through his answer, entitled to have the bonds and mortgages restored to him without the necessity to file a cross bill. *Ib.*
12. Trustees of an invalid trust, who reasonably defended it but who were cognizant of all the transactions out of which its invalidity arose, decreed to bear their own costs. *Ib.*
 13. The right of a banking association to purchase state stocks attaches only when the object is to affect a deposit or pledge of the same for circulating notes, or, if for any other purpose, it should be the investment of capital or surplus funds for the sake of interest. It should not be done on credit and by a deposit of their securities and for speculation with a view to profit. *Ib.*
 14. Nor can such an association purchase upon credit (not for an investment) depreciated paper of the banks of other states at a discount, with an intention to re-sell the same at an expected profit or to be laid out in cotton at the south to be shipped to Europe. *Ib.*
 15. Nor can such an association, especially while it is in pecuniary difficulties, buy up, with its own bills of exchange, shares of its own capital for the purpose of being sold again and, in the meantime, of being used as a means of raising money. *Ib.*
 16. The revised statutes, on the subject of preventing the insolvency of monied corporations and to secure the rights of creditors and stockholders, apply to associations under the general banking act of 1838. *Ib.*
 17. Where an injunction is issued to restrain a foreign banking company from proceeding to foreclose a mortgage given as security for their certificates and there is a serious question as to the transaction not being within the spirit of the restraining act against unauthorized banking and the circulation of certain notes or evidence of debt issued by banks, (1 R. S. 712) the court will not dissolve the injunction on the coming in of the answer. (The court, however, in this case allowed a cross-bill to be filed by the company to sell the property embraced by the mortgage, inasmuch as the same might, otherwise, have been sacrificed.) *Ib.*
 18. A foreign institution, on an application in New York to loan \$100,000 at seven per cent. on bond and mortgage of property there, agreed to give their certificates to that amount bearing interest at five per cent. and a large portion of them payable in twenty years: such a transaction, *it would seem*, is usurious. *Stoney v. The American Life Insurance and Trust Company*, 332.
 19. Although there may be a partnership in the use and working of land, there cannot be one in the buying and selling of real estate, so as to carry with it the rights, powers, duties and responsibilities of partners under the law merchant. *Patterson v. Brewster*, 362.
 20. Where an association is formed for the purchase, sale and improvement of real estate and its trustees (pursuant to its articles) effect sales and buy in their own names individually and so give their own bonds and mortgages, a seller cannot follow the associates where the trustees become insolvent. It might be otherwise, however, where the sale was made on the credit of the capital of the association and on that of the parties where their shares have not been paid in. *Ib.*
 21. The fact of the death of some shareholder in an association does not create a difficulty sufficient to justify a suit in equity in order to make all contribute to pay a debt. *Ib.*

And see, RELIGIOUS CORPORATION, 1; INJUNCTION, 3.

ATTORNEY. See SOLICITOR and CLIENT.

B**BANK NOTES.**

1. Interest allowed on bank notes from the day of demand out of the surplus effects of a bank in a receiver's hands; such bank having been wound up through this court, but not on the ground of insolvency. *Bank Commissioners v. La Fayette Bank*, 287.

And see, LOST NOTES, 1.

C**COMMISSIONS.**

1. Commissions, in the two-fold capacity of executor and trustee, not allowed. *Holley v. S. G.*, 284.

CONFIDENTIAL COMMUNICATION.

1. A solicitor who is made a defendant, and who desires to protect himself from answering on the ground of confidential communication, must distinctly show that his knowledge and information came solely from his client. He is not exempt, merely because he obtained it while engaged in business for his client. And should he afterwards become the executor of his client and he is made a defendant to reach the property which had been held by such client, the privilege would cease and he must answer in connection with it. *Crosby v. Berger*, 254.

CORPORATION. See, ASSOCIATION. CORPORATION.**COSTS.**

1. Where a seller had not delivered an abstract of his title, and had not cleared off a judgment, he was not allowed his costs on a bill for specific performance, although he succeeded in the suit. *Scott v. Thorp*, 1.
2. Both parties being considered in the wrong, on a bill for specific performance, each one had to bear his own costs, except the costs of exception to the master's report of a good title, which the vendee had to bear. *Ib.*
3. An accumulation of costs, arising from a solicitor's spreading litigation by a second suit, while the first is pending, and might, by an amendment or otherwise, be made sufficient, will be disallowed; and, if paid, must be refunded. The client's consenting to the proceedings, by signature and oath to the pleading involved, does not debar him from questioning its propriety. *De Rose v. Fay*, 40.
4. Trust deed set aside on the complaint of a receiver, as the court considered the trustees so placed that they could not well do otherwise than defend it; and yet, as the fact was that they were not strangers to the transactions out of which it arose, and accepted the trust knowingly, they were decreed to bear their own costs, and the receiver was allowed his costs out of the fund. *Leavitt v. Yates*, 134.
5. Where one of several complainants urges on a suit after he has taken the benefit of the bankrupt act and costs accrue, these are not recoverable out of after acquired property. *Leavitt v. Baldwin*, 289.

6. Where several exceptions are taken for impertinence when one only should have covered the matter, the court will, as to costs, look at it as one exception merely. *Renwick v. Mack*, 380.
7. Where a complainant files a judgment-creditor's bill and a retaxation of costs takes place in the court below whereby the judgment becomes less than \$100, he will not be allowed to dismiss his bill without payment of costs here. *Newell v. Burbank*, 536.
8. Executors, in pursuing a debt, made a person a party who they had a fair right to suppose held a claim. The latter denied holding such a claim and yet met every allegation of the bill, thereby making a long answer. On an application, by the complainants, to dismiss the bill without costs: *The Court* restricted such defendant's costs to a disclaimer and to the ordinary costs of solicitor and counsel fees of opposing the motion. *Smith v. Wyckoff*, 543.
9. Although a complainant filing a bill of interpleader ordinarily gets his costs, yet where he leaves unprotected (by not making him a party) one who should have been primarily protected, *e. g.* his accommodation endorser, and compels the filing of another bill, he will not be allowed his costs. *Palmer v. Elliott*, 643.

And see, LOST NOTES, 1.

COVENANT.

1. A covenant to extend a lease which does not fix the amount of rent cannot be enforced in equity. *Robinson v. Kettledas*, 67.
2. A covenant to renew a lease at a certain rent, without stating what covenants the new lease should contain, does not carry any of the old covenants with it. Therefore, although an old lease contained a provision that the tenant should pay taxes and assessments, yet, as the lessor merely covenanted to make a new lease at a given rent and said nothing about covenants: *Held*, that he must give such new lease, exclusive of a covenant, on the part of the tenant, to pay taxes and assessments. *Willis v. Astor*, 594.

CROTON WATER. See, RIVER, RIPARIAN OWNER, 1, 2, 3, 4, 5, 6.

D

DAMAGES.

1. Items of damage allowed on a bond given under the 31st rule, on granting an injunction to restrain the sale of mortgaged premises. *Edwards v. Bodine*, 292.
2. Appraisers appointed to assess damages to the riparian owner arising from the diversion of the water of the river, should allow to a tenant of a mill (under such owner) the damages he will sustain. *Water Commissioners v. Van Cortlandt*, 545.
3. Mode, recommended by the court, of assessing damages in favor of owners of unequal shares in different pieces of land and others on account of the diversion of water of a river. *Ib.*
4. Where the main body of water in a river has been controlled by a dam and turned and used by a mill for forty years and the dam and mill were maintained without objection, a perpetual right in such use of the water is thereby gained; unless a qualified right as to time is insisted on and proved by the party who attempts to narrow it. Even twenty years of such enjoyment would presume a grant. *Ib.*

5. The principles applicable to the use of river water, as stated by the court in *Wright v. Howard*, 1 Sim. & S. 190, recognized as in force here. *Ib.*

DEBTOR AND CREDITOR.

1. On the 5th of April, 1802, Charles H. executed bonds to Henry and Newberry H., for \$375, and \$150 payable, on the death of their mother Martha, to them or if either died without issue, to the survivor or his heirs. Charles H. died and among his papers was found the note of Henry H., for \$310, dated 2d October 1818, and his draft of the same date on Charles H., in favor of Newberry H., for \$200, inclosed in a memorandum written by Charles, dated 3d January, 1829, showing \$548 due, "and to be taken by agreement from the bonds." Newberry H. died insolvent, indebted to Charles; but, by his death, the bonds became the sole property of Henry H. In 1818 Henry H. left this state for Baltimore, did business and failed there in 1829; took the benefit of an insolvent act in the Baltimore County Court; but did not insert these bonds amongst his assets. Martha was not then dead, but died soon afterwards. Shortly after taking the benefit of such act, Henry H. came again to this state and sued the administrator with the will annexed of Charles H. on the bonds, who, believing that Henry H. would plead the statute of limitations to any set-off founded on the note and draft and not knowing that the former had gone into insolvency in Baltimore, allowed judgment to go by default. But having now got knowledge of such insolvency proceedings, he filed a bill to restrain Henry and to have the judgments satisfied and cancelled. *The court* decreed it to be a fair conclusion that Henry, when he took the benefit of the act, considered the bonds paid and extinguished by his indebtedness on the note and draft (which, with interest, amounted to more than the bond;) that the statute of limitations, owing to his absence, would not have availed him; that it was equitable to remember how an administrator had to act from the information of others in obtaining facts for defence; and that the complainant, administrator, was within the exception of the statute against relief from judgments. Decree as prayed for, with costs. *Hewlett v. Hewlett*, 7.
2. Where an assignment for creditors is had, and the assignees let furniture (embraced by it) on a rental to one of the assignors, until a favorable time for sale, the assignment will be void as to this, for want of a change of possession. *Dervey v. Adams*, 21.
3. Although a deed or assignment is set aside by a decree obtained in a judgment creditor's suit, still it should be limited to the rights of such judgment creditor and, therefore, another judgment creditor does not, necessarily, get a benefit thereby. *Davis v. Perrine*, 62.
4. Where a judgment debtor filed a bill, on his own behalf only, against his debtors and their assignees, complaining principally of the latter in allowing the debtors to be their agents and receive large compensation and did not amend, so as to go against the assignment itself until long afterwards, when the property had been distributed, and brought his cause to a hearing on bill and answer when he might, by expedition and replication, have made a sufficient case: his bill was dismissed, but without costs. *Redmond v. Wemple*, 221.
5. If an assignee to pay debts allows the debtor to act as his agent and receive large compensation therefor, he will have to account for the amount to creditors, on a bill filed in behalf of all of them. *Ib.*
6. A defendant in a bill filed by a judgment-creditor cannot be compelled to discover property to a later date than the filing of the bill. If a discovery to a later date is required, a supplemental bill should be filed. *Gregory v. Valentine*, 282.
7. Where a complainant claims to make the remainder in fee of an estate, vested in infants,

- liable for a debt accruing for professional services performed in relation to the rights of the father and mother in such estate, it is necessary, for his success, that he should affirmatively show the debt in question was contracted for the preservation of the inheritance of the children or for its permanent improvement. And where this is not shown on the hearing, the court will not indulge him with a reference to a master to inquire how far his services contributed to preserve and benefit the inheritance, so that a portion, at least, of the debt might be charged thereon. *Warner v. Hoffman*, 381.
8. In a creditors suit, although there may have been a decree, the neglect or omission of one will not preclude his right to be afterwards let in, provided the other creditors are placed in no worse position or put to additional expense. *Ib.*
 9. Where different judgment creditors file their bills on the same day, he who first gets his pleading on file has priority of payment. *Safford v. Douglas*, 537.
 10. A judgment creditor, who proves his debt in bankruptcy in order to oppose the bankrupt's discharge and not with a view to a dividend and succeeds in his opposition, cannot afterwards pursue the bankrupt and his property through a creditor's bill. All the property becomes vested, on the first application of the bankrupt, in the provisional assignee and the proof of debt is an election to come in and the judgment is thereby surrendered—and dividends only can be received. *Hartun v. Corse*, 585.
 11. *It would seem*, that a quarter's salary due to a defendant on a certain day can be secured under a judgment creditor's bill filed on that day, notwithstanding the defendant, a few days before, had filed his petition in bankruptcy. But, however this may be, he, himself, cannot take the point by a plea—it is the province of his assignee. *Smith v. —*, 653.
 12. Where, on a dissolution of copartnership, one partner assigns all his rights in its stock and properties to the other and the latter covenants to apply such stock and properties to the debts of the firm, its creditors may follow it for that purpose, notwithstanding the receiving partner makes divers transfers of it in fraud of the creditors and even though both parties are applicants under the bankrupt law. The effects become a trust fund for the creditors under the covenant. *Wildes v. Chapman*, 669.

And see, STALE DEMAND, 1.

DEED.

1. Certificate of acknowledgment, signed by a master in chancery, upon a deed dated 29th May, 1790, executed by a married woman of her estate showed, on a private examination, that she "acknowledged she executed the same without any fear, threat, or compulsion of her husband." The statute of 1798 declared, that no estate of a *feme covert* should pass without a previous acknowledgment by her on a private examination, &c., that she executed such deed freely, without any fear or compulsion of her husband. *Held*, in the absence of proof of fear, threat, or compulsion, that there was a substantial compliance with the statute and that the certificate was to be presumed sufficient. *Meriam v. Harsen*, 70.
2. Although a bill in partition states that certain property belongs to husband and wife, and the decree follows the bill, yet, as an accounting was connected with the suit which justified the making of both of them parties, it was not to be considered that these statements created an estoppel as to the real rights of these parties, and that the husband alone might, notwithstanding, be seized of a fee. *Ib.*
3. A wife may, without the intervention of a court, convey away her estate to a stranger or to her husband by circuitry; but chancery will scrutinize the act closely, to see that she has not been circumvented, coerced, defrauded or unduly influenced. *Ib.*

4. On the 29th May, 1790, husband and wife, for a nominal consideration, conveyed the estate of the wife to G. F., who, by deed dated the next day, also for a nominal consideration, conveyed the property to the husband in fee. Deed recorded. Afterwards the husband alone made long leases, still living in harmony with his wife, and she, with others, executed certain articles dated in Feb. 1809, in which there was a recital and declaration recognizing the fee in the husband; there was nothing to show but the act was a free will offering by the wife; the transaction had been suffered to stand for about forty-five years, unquestioned and undisturbed; and both husband and wife were dead: *Held*, a valid deed. *Ib.*
5. Parties were recognized by the court as man and wife, although no marriage ceremony had taken place, from their having co-habited together for years, and being considered as such by their acquaintances, and also from having both executed a deed, in which the woman was described as wife. *Hicks v. Cochran*, 107.
6. Although the effect of a deed of real estate to husband and wife is to let the entirety go to the survivor, yet it may, by express words, create a tenancy in common and that too in unequal estates, as, one to take a moiety for life and the other in fee. *Ib.*
7. Husband and wife make a deed to a party who reconveys it, "the one equal half part to each;" but it was coupled with conditions: for instance, that while the wife was to take the rents for life, she had not "power to sell or incumber her half, and could dispose of it only by will;" and the husband was, also, only to do so as to his moiety, save by her consent. The wife died first, having made a will; but the husband assumed the ownership of the whole and devised it to his second wife and to his son by her. *Held*, that the restrictions grafted on the fee were not void, that the husband had bound himself thereby and so relinquished his right to the wife's moiety; and also, that the will made by her would be looked upon in the nature of a valid appointment which her heir could not set aside and in relation to which the second wife and the son had, certainly, no right or claim. *Ib.*
8. Where a trust deed, made by a banking association with a view to protect the holders of its certificates, is set aside, a holder who was induced to take some of them and give up bonds and mortgages which the association had before transferred to him as security for indebtedness, and this was done at the request and upon the earnest assurance of the association of the validity of such trust-deed and certificates, and an opinion of counsel was shown by way of further inducement. *Held*, that the holder was, through his answer, entitled to have the bonds and mortgages restored to him without the necessity to file a cross-bill. *Leavitt v. Yates*, 134.
9. Trustees of an invalid trust, who reasonably defended it but who were cognizant of all the transactions out of which its invalidity arose, decreed to bear their own costs. *Ib.*
10. Trust-deed set aside on the complaint of a receiver: as the court considered the trustees so placed that they could not well do otherwise than defend it, and yet, as the fact was that they were not strangers to the transactions out of which it arose and accepted the trust knowingly, they were decreed to bear their own costs; and the receiver was allowed his costs out of the fund. *Ib.*
11. A deed, free from fraud and made with a view to effect a family settlement, although voluntary, will be upheld in chancery—public policy and the peace of families encourages it. *Cruger v. Douglas*, 433.
12. Deed of the 5th of October 1831, executed by husband and wife in consideration of the grantee, who was the wife's mother, releasing dower in the daughter's land. It had been acknowledged and left in possession of the daughter for the mother. After the death of the daughter's husband, the deed was found mutilated by having had the signatures

of the grantors and subscribing witnesses cut out. After this (on the 17th of January 1845) it was recorded: *The court held*, that it was to be taken as an executed and delivered deed; but that as the grantors continued in possession exercising all acts of ownership, the grantee was affected by subsequent instruments and that an after mortgage by this husband and wife, recorded before the mutilated deed got upon the record, had a preference. *Frost v. Peacock*, 678.

13. An exception in a deed is that which is severable from the thing granted. An inseparable incident does not amount to an exception. *Maynard v. Maynard*, 711.
14. It does not amount to a reservation where a benefit is given in a deed to persons not parties to it and having no legal title and where nothing is reserved to the grantor. But there is an *intention*, to which the court will give effect according to the intent which is to be gathered from the whole instrument. *Ib.*
15. He who takes under a deed must perform all its express and implied conditions. His election precludes objection and becomes matter of estoppel *in pais*. *Ib.*
16. Deed of grant of a farm to a son in fee: "*excepting and reserving to my three daughters H., E. and R. a right of living on the said before mentioned premises as heretofore, so long as they shall respectively remain single.*" It appeared that prior to and when the deed was executed, the daughters lived with their father and were supported with the rest of his family on the farm and they so remained with the son (their brother, the grantee) until his death and they were still on the farm. In a partition suit, the question was as to the extent of their right or estate? *Held*, that the clause implied not only the mere being upon the premises but also subsistence, the means of living—a home. And the court pointed out how it could be provided for in a decree for sale and partition. *Ib.*

DIRECTOR.

1. Directors of a company are but agents for the benefit of others. *Leavitt v. Yates*, 134.

DIVORCE.

1. No decree can be had in a divorce suit where the only acts proved have occurred not within the period alleged in the bill, but after it was filed. *Ferrier v. Ferrier*, 296.
2. The fact of non-cohabitation, in a divorce case, is not sufficiently proved by a witness merely deposing that the parties (since separation) had not resided together "to the best of deponent's knowledge and belief." The persons with whom the wife has resided had better prove the fact. *Turney v. Turney*, 566.
3. Nor will a divorce be granted on the unsupported testimony of abandoned women. *Ib.*
4. On an application for a new trial of a feigned issue in a divorce suit, the affidavits brought before the court on both sides are to be taken together to ascertain whether there is a ground for disturbing the verdict within any principles governing courts on the granting new trials in such cases; and if not, then the only consideration for the court is, whether the judge, on the trial, erred in admitting or rejecting testimony or in giving any directions or in any law points whereby injustice has been done. *Van Cort v. Van Cort*, 620.
5. Although witnesses, on a feigned issue, have been examined to matter foreign to the issue and they have been excepted to, yet if no use is afterwards made of their testimony, it is to be presumed that it has not influenced the jury and will not be ground to disturb the verdict. *Ib.*
6. Where a witness has been examined and cross-examined, it is in the discretion of the

judge to permit the cross-examination to be resumed. The refusal is not a ground for a new trial, unless the defendant can show he has lost the benefit of material disclosure. *Id.*

7. On a feigned issue in an adultery case, the husband of the woman with whom the defendant is charged to have had connection is a competent witness. *Id.*
8. After the evidence of a woman, alleged to have been the adulteress, was through, other witnesses were brought to prove her conversations and declarations touching some of the matters she had been examined about and involving her conduct and that of the defendant charged with the adultery: *Held*, that their introduction was not improper. *Id.*

DOWER.

1. Where a wife joins with a husband in a mortgage of his lands and he dies after sale in foreclosure and after confirmation of the report of such sale, she will not be entitled to any amount by way of dower out of any balance of the avails of the sale. *Frost v. Peacock*, 678.

E

EQUITY.

1. Equity ascertains object and design. It looks for substance, rather than at form. Where words admit of different meaning, it grasps at that which upholds, not that which destroys. *Cruger v. Douglas*, 433.

ESTOPPEL.

1. Although a bill in partition states that certain property belongs to husband and wife, and the decree follows the bill, yet, as an accounting was connected with the suit which justified the making of both of them parties, it was not to be considered that these statements created an estoppel as to the real rights of these parties and that the husband alone might, notwithstanding, be seized of a fee. *Meriam v. Harsen*, 70.

EVIDENCE. WITNESS.

1. An important exhibit or document, not read but marked before an examiner, and not used on the hearing, was brought in afterwards before a master on a reference as to title, and admitted as evidence by the court. *Scott v. Thorp*, 1.
2. In matters of account before a master, the defendant's answer (on oath) is evidence so far as it is responsive to the complainant's bill. *DeMott v. Benson*, 297.
3. Where a mortgage is given professedly for an account which had yet to be adjusted and the mortgagor, by his answer, showed that he had repeatedly attempted to obtain a settlement without effect and denied that any thing like the amount claimed is due, it is incumbent on the mortgagee to produce accounts and evidence to make out the amount. *Id.*
4. The staleness of a known demand creates a suspicion against it. Where a principal witness has promoted a stale claim (eleven years old) and his hostility to the defendant is apparent, his testimony will be far outweighed by an answer fairly responsive to the bill. *Plet v. Bouchaud*, 30.
5. Although persons are alleged to have joined in conspiring to obtain the execution of a deed, yet (not being parties) they are competent witnesses. *Cruger v. Douglas*, 433.
6. Assessors, acting under statute or by direction of a court to ascertain and report damages due to owners on account of the diversion of water, act properly in hearing evi-

- dence of prescription and grant, the better to ascertain rights and apportion accordingly. *Water Commissioners and Van Cortlandt*, 545.
7. On an application for a new trial of a feigned issue in a divorce suit, the affidavits brought before the court on both sides are to be taken together to ascertain whether there is a ground for disturbing the verdict within any principles governing courts on the granting new trials in such cases; and if not, then the only consideration for the court is, whether the judge, on the trial, erred in admitting or rejecting testimony or in giving any directions or in any law points whereby injustice has been done. *Van Cort v. Van Cort*, 621.
 8. Although witnesses, on a feigned issue, have been examined to matter foreign to the issue and they have been excepted to, yet if no use is afterwards made of their testimony, it is to be presumed that it has not influenced the jury and will not be ground to disturb the verdict. *Ib.*
 9. Where a witness has been examined and cross-examined, it is in the discretion of the judge to permit the cross-examination to be resumed. The refusal is not a ground for a new trial, unless the defendant can show he has lost the benefit of material disclosure. *Ib.*
 10. On a feigned issue in an adultery case, the husband of the woman with whom the defendant is charged to have had connection is a competent witness. *Ib.*
 11. After the evidence of a woman, alleged to have been the adulteress, was through, other witnesses were brought to prove her conversations and declarations touching some of the matters she had been examined about and involving her conduct and that of the defendant charged with the adultery: *Held*, that their introduction was not improper. *Ib.*

EXECUTOR AND ADMINISTRATOR.

1. Executors of a will of real and personal property had filed no inventory in New York, where part of the personalty was, and one of them was controlling the estate, and a wasting of it was alleged, while their pecuniary inability was stated, and it was suggested that coercive steps were about to be taken in the surrogate's office, (where they had, however, lately given bond on application of the present complainant,) and the bill prayed that the executors be enjoined and also suspended, and a receiver appointed. *The court held*, that the surrogate had full power in the premises, and there were not such special circumstances as made it necessary for this court to interfere on the ground of having concurrent jurisdiction. Preliminary injunction dissolved. *Whitney v. Monro*, 5.
2. Commissions, in the two-fold capacity of executors and trustee, not allowed. *Holley v. S. G.*, 284.
3. *It would seem*, that where there is no direct and pointed allegation of misconduct in the bill against executors lending money upon insufficient security or contrary to the directions of the will, they will not be held personally liable on a reference to account where a loan has been made on personal security. *Ib.*
4. Where a beneficiary under a will had liberty to draw out a specified sum, but passively chooses to let it remain undemanded in the executor's hands, such beneficiary cannot, afterwards, claim interest upon it. *Ib.*
5. Equity can control foreign executors and administrators where failure of justice or a hopeless remedy might otherwise occur, but it will not ordinarily sustain suits against them (where they have not taken out letters in this state.) *Brown v. Brown*, 343.

6. Bill for an account and to secure assets was filed by a residuary devisee and legatee residing within the jurisdiction against executors casually here but whose residence was in another state, where the will had been only proved and the testator had died. Although the principal part of the property was in that other state, there was some within New York; yet there were no special circumstances in the case. Demurrer interposed; and allowed. *ib.*
7. The R. S. which require an executor to elect between a legacy given for services and compensation allowed by statute, do not act retrospectively; and an executor under a will proved before 1830, is entitled to both. *Aspinwall v. Pirnie*, 410.
8. H. Z., by his will, gave the rents and profits of his real and personal estate to his wife for life, if she remained his widow; but if not, then, he authorized and empowered his executors to let, sell or dispose of his real estate or such portion as the major part of them should think proper in their discretion and make and execute conveyances; and in case his executors should judge it necessary to sell and dispose of such real estate or any part of it, then, to place the nett proceeds at interest and such interest to be paid to his wife for life. After her death, the then remaining part of his estate, real and personal, was to be converted into cash and placed out at interest for the benefit of his son J. H. Z. and the interest given to him during life. And after wife's death, he gave and devised his estate to the children of his said son. The son died before the widow, leaving two children; and the widow married again and then died. The executors had not sold the real estate, but leased it during the widow's life: *Held*, that the executors had a naked discretionary power, which they used by so leasing during the widow's life; and as the son died in her life time, their power ended with her death: and that which was real estate went, as such, to the son's children and was not, then, to be considered as if converted into personalty. *Slocum v. Slocum*, 613.
9. Executors were called to account in a surrogate's office by a widow of the testator having a present interest and acting on behalf of infant children; and at the time of bringing in their accounts they got a citation for creditors to attend a final settlement: *Held*, that—although this was going beyond the original application—the widow and creditors would be bound by it, but not the children, as there was not to be a distribution until they came of age. *Bogart v. Van Velsor*, 719.
10. Even where executors loan on real estate, they must use care as to title and ascertain that the value is such as will, in all probability, be an adequate security for repayment whenever the money shall be called in. *ib.*
11. Criterion of value for executors in loaning on real estate is the estimate of men of ordinary prudence who would deem it safe to make a like loan with their own money. *ib.*
12. Testimony of conversations which happened several years ago is to be received with great caution; and especially when it comes from witnesses nearly related to a party in interest. *ib.*
13. Good faith and honest intentions will not protect men in the performance of a trust when they depart from prudential rules which the experience of others in similar transactions have approved as the only safe guides. *ib.*
14. A gave C. F. two-thirds of a farm and left to executors the remaining one-third on a trust, subject to a widow's life estate; and directed C. F. and the executors to pay S. F. a legacy of \$800 (and two small legacies) in proportion to the shares of land devised. Also, that if C. F. neglected to pay his proportion, the executors were to sell sufficient to pay. And there was a provision for partition on the mutual consent of widow, executors and devisees. The partition took place; and C. F., at the instance of the acting

executor, gave his bond and mortgage (to such executor) on the two-thirds of land set apart to him, to secure as well the widow her share of the life estate as the proportion of legacies payable by him to the next of kin of S. F. (the legatee, who had died). After this, the widow died; and, then, C. F. paid the executor his proportion of the legacies and the mortgage was cancelled. At this time there was no legal representative of S. F.; and his only child and next of kin was a minor. The executor became insolvent and the legacy was lost. *Held*, that it was competent for the executor to take the bond and mortgage; and that the payment to him under them was sufficient payment by C. F., of his proportion of the legacies. *Frost v. Frost*, 733.

15. *Also held*, as the present action, by S. F.'s next of kin, for such proportion of the legacy of \$900, was not commenced by the legatee's next of kin until six years after the death of the widow of the testator or of the grant of any administration to S. F.'s widow or of the coming of age of such next of kin, that the statute of limitations applied. *Id.*

And see, *QUIA TIMET*, 1.

F

FEIGNED ISSUE. See, *EVIDENCE*, 7, 8, 9, 10, 11.

FRAUD.

1. A clerk of a bank, through fraud using the borrowed check of a firm, whose account (in that way overdrawn) was more particularly under his own supervision, withdrew money from the bank and deposited it to his own account in another bank and bought stock with it and caused such stock to be placed in the name of his sisters without consideration: *Held*, that the sisters were to be construed as trustees for the bank defrauded. *Bank of America v. Pollock*, 215.
2. Radcliff, in 1812, bought and had land conveyed to him by Van Benthuyzen and gave a mortgage back; but did not know of two judgments against the latter. On the 21st January 1821, the attorney of Van Benthuyzen sold the land under the power in the mortgage without any notice, request or demand and on the usual advertisement; and bought in his own name. Radcliff, hearing of the sale, went to Van Benthuyzen, who consented to waive the sale or to allow full value on a settlement. The attorney, by pretence, strengthened his title by a deed of the power of sale from Van Benthuyzen; and, at last, insisted on ownership. Soon after the sale, the attorney obtained control of the two judgments and sold the land and again bought in his own name, without notice or knowledge of Radcliff; but the attorney, as well as Van Benthuyzen, afterwards declared that no advantage thereby should be had against Radcliff. In 1834 a bill was filed by Van Benthuyzen against the attorney, which resulted in a decree and order against the attorney requiring him to convey to Van B., but giving him a lien for any balance due to him. He conveyed on the 17th day of January, 1839. Radcliff had gone into possession from the first and so continued until his death in 1842; and his heirs, the complainants, had followed up such possession. But, now, the attorney proceeded under the aforesaid decree and order to sell for balance and alleged to be due from Van Benthuyzen (who was also dead) and the attorney had also put a mortgage on the property: *Held*, on a bill filed by the said heirs of Radcliff to be quieted in possession—to which a demurrer was interposed by the attorney—that an equity had arisen on the original purchase and covenants whereby Radcliff was entitled to be protected against the legal title conveyed by the attorney (under the decree) to Van Benthuyzen; and that this equity arose at

the time of the said decree of the 17th of January 1839, and as six years had not transpired since then, that the statute of limitations did not apply. *Radcliff v. Rowley*, 646.

And see, DEBTOR AND CREDITOR, 2.

FRAUDULENT CONVEYANCE. See, STATUTE AGAINST FRAUDULENT CONVEYANCES. 1.

G

GIFT. See, MILL, 1.

GRANT.

1. The legislature, making a grant to some, may afterwards make a similar grant to others; but, without such latter grant, the former have exclusive right and no express prohibition or restraining law is necessary to prevent rivalry. The grant implies a prohibition. *Tyack v. Bromley*, 258.
2. *It would seem* that a statutory grant of fees or perquisites carries with it an exclusive right to perform the services that earn them. *Ib.*

H

HUSBAND AND WIFE.

1. Certificate of acknowledgment, signed by a master in chancery, upon a deed dated 29th May, 1790, executed by a married woman of her estate showed, on a private examination, that she "acknowledged she executed the same without any fear, threat, or compulsion of her husband." The statute of 1788 declared, that no estate of a *feme covert* should pass without a previous acknowledgment by her on a private examination, &c., that she executed such deed freely, without any fear or compulsion of her husband. *Held*, in the absence of proof of fear, threat, or compulsion, that there was a substantial compliance with the statute and that the certificate was to be presumed sufficient. *Meriam v. Harsen*, 70.
2. Although a bill in partition states that certain property belongs to husband and wife, and the decree follows the bill, yet, as an accounting was connected with the suit which justified the making of both of them parties, it was not to be considered that these statements created an estoppel as to the real rights of these parties, and that the husband alone might, notwithstanding, be seized of a fee. *Ib.*
3. A wife may, without the intervention of a court, convey away her estate to a stranger or to her husband by circuitry; but chancery will scrutinize the act closely, to see that she has not been circumvented, coerced, defrauded or unduly influenced. *Ib.*
4. On the 28th May, 1790, husband and wife, for a nominal consideration, conveyed the estate of the wife to G. F., who, by deed dated the next day, also for a nominal consideration, conveyed the property to the husband in fee. Deed recorded. Afterwards the husband alone made long leases, still living in harmony with his wife, and she, with others, executed certain articles dated in Feb. 1809, in which there was a recital and declaration recognizing the fee in the husband; there was nothing to show but the act was a free will offering by the wife; the transaction had been suffered to stand for about forty-five years unquestioned and undisturbed; and both husband and wife were dead: *Held*, a valid deed. *Ib.*
5. Parties were recognized by the court as man and wife, although no marriage ceremony

- had taken place, from their having co-habited together for years, and being considered as such by their acquaintances, and also from having both executed a deed, in which the woman was described as wife. *Hicks v. Cochran*, 107.
6. Although the effect of a deed of real estate to husband and wife is to let the entirety go to the survivor, yet it may, by express words, create a tenancy in common and that too in unequal estates, as, one to take a moiety for life and the other in fee. *Id.*
 7. Husband and wife make a deed to a party who reconveys it, "the one equal half part to each;" but it was coupled with conditions: for instance, that while the wife was to take the rents for life, she had not "power to sell or incumber her half, and could dispose of it only by will;" and the husband was, also, only to do so as to his moiety, save by her consent. The wife died first, having made a will; but the husband assumed the ownership of the whole and devised it to his second wife and to his son by her. *Held*, that the restrictions grafted on the fee were not void, that the husband had bound himself thereby and so relinquished his right to the wife's moiety; and also, that the will made by her would be looked upon in the nature of a valid appointment which her heir could not set aside and in relation to which the second wife and the son had, certainly, no right or claim. *Id.*
 8. Where a bond of a husband and a mortgage made by husband and wife are explicit as to principal becoming due in default of payment of interest within a specified number of days, the court cannot relieve from a foreclosure on default of payment of interest within the number of days fixed, although the amount may be large and the property mortgaged belongs to the wife and the debt was the husband's. Nor, on payment of interest and costs. *Hale v. Gouverneur*, 207.
 9. Although, on a mortgage of the wife's land for the husband's debt, she is as a surety and his estate, as tenant by the curtesy, will generally be decreed to be sold first, yet, when the sale of it cannot possibly make the amount due, the whole interest of the husband and wife will be sold together. *Id.*
 10. Where a husband mortgages his own property for his own debt and, at the same time, the wife joins her husband in mortgaging to the same mortgagee her property for the same debt; and, afterwards, the mortgagee buys the husband's mortgaged premises and pays him the purchase money (not crediting it on the mortgage) and thereby the husband's mortgage merges, the mortgagee, in an attempt to foreclose on the wife's property, will have to credit the amount at which he bought the husband's property. This is held on the ground, that the wife is a surety and that the creditor must first resort to the primary fund and relieve the surety as far as possible, and can do no act to impair the benefit of substitution without express consent. And where, in such a case, a mortgagee (holding two such mortgages,) had—when calculating the amount of purchase of the husband's premises and otherwise from the mortgages generally—been satisfied, but filed a bill to foreclose and sell the wife's property, insisting on a balance and that the husband's mortgage was merged and that the matter of purchase was not to be taken into account; and another, after-mortgagee, who had advanced money to the heir of the wife, filed a cross-bill; it was held, that the mortgagee filing the foreclosure bill took nothing and should be dismissed, paying costs; and that, in the cross suit, a sale should be had to satisfy the mortgagee filing such cross-bill. *Wheelwright v. Loomer*, 232.
 11. A grantor gave a leasehold house to a trustee, to receive rents and apply them towards the support of H. C. "And after the death of H. C., I give, grant and convey the aforesaid house to my natural daughter, M. B. M. her heirs and assigns." Here the daughter got a vested remainder assignable and descendable; and on her making a marriage settlement (her future husband joining) whereby the property was secured to the survivor of

- them, and the husband survived: *Held*, that he was entitled under the settlement and was not left to his marital rights. *In the matter of Leefe*, 395.
12. Husband's rights in a wife's property stated by the court. *Ib.*
 13. Equity has no control over husband and wife where there is no cause for separation or divorce except with reference to property. *Cruger v. Douglas*, 435.
 14. Chancery cannot compel cohabitation or a restoration of conjugal rights. *Ib.*
 15. Where a husband, immediately after marriage and without consideration, alone executed an instrument of settlement, whereby he released and conveyed to trustees the wife's real and personal estate: "*To hold and keep both the principal and interest thereof during the said marriage, exempt from his debts, contracts or control, to be managed and disposed of on her separate orders or receipts or by her deeds or will, so that she may enjoy and dispose of the same as it came from her parents and sister or may hereafter in any manner accrue to her in all respects as if she were unmarried*;" and delivered the same to such trustees: *Held*, that the instrument was valid; that the statute against fraudulent conveyances, in requiring a consideration to be expressed, does not control an instrument which creates and passes the estate, title or interest: that a consideration is here implied by execution; and that a deed like the above is not to be deemed executory, promissory or as a covenant or agreement to do some future act. *Ib.*
 16. Also, *held*: that the instrument is not void under the statute of uses and trusts: 1 R. S. 727 § 25 for, while the words, "*to be managed or disposed of on her separate orders or receipts or by her deeds or will, so that she may enjoy the same in all respects as if she were unmarried*," would seem to give her all power as if she were a *feme sole* and the trustees be mere nominal parties, yet, when coupled with the words (applying to the trustees) "*to hold and keep both the principal and interest thereof during the said marriage, &c.*," a requirement to perform active duties appears and makes the trust good. *Ib.*
 17. The wife by a deed (under the power in the above instrument) irrevocably transferred to her husband a half of the income of her estate, real and personal, for life and directed her trustees to pay it. *Held* to be a valid instrument; and that the disabling language of the § 63 of the statute of uses and trusts did not affect it: because, here is an appropriation only of the benefits resulting from the trust in a manner compatible with its object and which does not put an end to the interest of the beneficiary. *Ib.*
 18. The fact of non-cohabitation, in a divorce case, is not sufficiently proved by a witness merely deposing that the parties (since separation) had not resided together "to the best of deponent's knowledge and belief." The persons with whom the wife has resided had better prove the fact. *Turney v. Turney*, 566.
 19. Nor will a divorce be granted on the unsupported testimony of abandoned women. *Ib.*

I J

INFANT.

1. A widow who has a life estate in property devised to her, (while her husband is alive) cannot be compelled by this court to break into it or to apply the same towards the support of an infant child who will be entitled in remainder. Nor will the court order it out of such, his future estate. *In the matter of Ryder*, 328.
2. Where it is very doubtful whether executors have power to make a mortgage under which there has been a foreclosure sale and enrolled decree and the testator, making the will, left infant children who had appeared by a guardian *ad litem*, but the latter

had only put in a general answer and had not raised any defence and the purchaser of the property refused to take, fearing the children's rights: *The court* allowed the decree to be opened and decree vacated, with leave for the infants (one of whom had come of age) to put in a new answer to set up the defence of the invalidity of the mortgage. *Curtis v. Ballagh*, 635.

INJUNCTION.

1. Although there may be a defence to an action at law in a matter of usury, yet, a bill will hold to compel the giving up of securities left as collateral security for the usurious debt and an injunction will be a consequence to stay the action. *Peters v. Mortimer*, 279.
2. Items of damage allowed on a bond given under the 31st rule, on granting an injunction to restrain the sale of mortgaged premises. *Edwards v. Bodine*, 292.
3. D. was induced by the acting officer of a company to buy up 1000 shares of stock and pledge them to the company, they advancing \$50,000 on his note therefor. The company passed away these shares as on their own account. D. remonstrated; and they gave him up the note, paid him a balance and left an unascertained amount still coming to him in the transaction. Afterwards, the same officer induced D. to let the matter, for conformity, be reinstated upon their books and to give two large notes to cover the transaction, but not by way of indebtedness. Besides this affair, D. and J. had given their joint note for a loan. The company became insolvent; and its trustees brought actions against D. on the two large notes and on the joint note. He filed a bill to restrain the actions and for an injunction: *Held*, that D.'s claim for remaining balance on the 1000 shares was not sufficiently liquidated to allow of an equitable set-off; that the joint note could not, under any circumstances, be the subject of set-off against such individual claim; and that D. had a defence at law. Temporary injunction dissolved. *Davis v. The American Life Insurance and Trust Co.*, 308.
4. Where an injunction is issued to restrain a foreign banking company from proceeding to foreclose a mortgage given as security for their certificates and there is a serious question as to the transaction not being within the spirit of the restraining act against unauthorized banking and the circulation of certain notes or evidence of debt issued by banks, (1 R. S. 712,) the court will not dissolve the injunction on the coming in of the answer. (The court, however, in this case allowed a cross-bill to be filed by the company to sell the property embraced by the mortgage, inasmuch as the same might, otherwise, have been sacrificed.) *Stoney v. The American Life Insurance and Trust Company*, 332.
5. *It would seem*, that less strictness should be allowed in amending a bill where no injunction is in force or necessary to be sustained. *Coster v. Griswold*, 364.
6. It is not usual for this court to grant an injunction to restrain actions in the federal courts, but leave a party to apply there to stay them until the equitable relief is granted here—confirming the case of *Schuyler v. Pelissier*, vol. 3, 191. *Ib.*
7. In order to reinstate an injunction pending an appeal, a case must be made showing something like irreparable injury if not allowed; but, even then, the application should be made to the chancellor. *Ib.*
8. Preliminary injunction refused to stop a Rail Road Company from completing a tunnel through a city authorized by the civil authorities of the place—on an allegation of nuisance by an owner of adjoining property on the same line. *Hodgkinson v. The Long Island R. R. Co.*, 411.
9. Where an injunction is granted and a receiver is appointed and no motion is made to

dissolve the one or to get rid of the latter, an objection raised at an after-period of the cause against either, as having been improperly allowed, will not be regarded. *Post v. Dorr*, 412.

10. The court retained an injunction where, on the coming in of an answer, there seemed to be some equity in the complainants claim to have the fund which was in litigation applied as prayed for which might, at the hearing, possibly, be enforced. *Clark v. Martin*, 424.
11. Where defendants, having a lien and the possession of goods, are restrained by injunction from "selling, pledging or disposing" of the same: although the mere offer to sell may not amount to an infringement of the injunction, yet it might induce the court to appoint a receiver. *Tyler v. Poppe*, 430.
12. J. G. A., being proprietor of the bank of F., solicited the firm of M. C. & A. for their drafts; and, on obtaining, discounted them, paying in the then current notes of the bank. Subsequently and before the drafts matured and while M. C. & A. still held the greater portion of the bank notes, the bank failed; and J. G. A. assigned its assets; and, amongst them, the drafts to L. H., in trust for creditors. L. H. as holder sued M. C. & A. at law on their drafts at maturity: *Held*, that there was a case of equitable set-off and an injunction should issue to restrain the action at law. *Mel v. Holbrook*, 539.
13. A defendant is not to be punished for an infringement of so much of a writ of injunction as goes further than the prayer of the bill. *Freeman v. Deming*, 598.
14. Where an injunction bill is filed with affidavits annexed and an answer on oath is waived, but the same is put in under oath and strong affidavits also are read in support of a motion to dissolve the injunction, the dissolution is not a matter of course, especially where proofs may have to be taken before a correct decision can be had. *Mead v. Richards*, 667.
15. An injunction is not to be granted on filing a bill, where it is not essential to secure rights and where the filing of a notice of *lis pendens* will answer. *Waddell v. Bruen*, 670.
16. Injunction dissolved where the allegations embracing the equity are on information and belief. *Ib.*

And see, PRACTICE; INJUNCTION.

INSOLVENT.

1. It will be presumed that an insolvent exhibits a just account of his debts and credits and not that he has committed perjury or intended wrong in regard to such account. *Hewlett v. Hewlett*, 7.

INSURANCE. See, POLICY OF INSURANCE, 1; VENDOR and PURCHASER, 6.

INTEREST.

1. A note given for interest is not payment. *Lovett v. Racy*, 23.
2. Where a beneficiary under a will has liberty to draw out a specified sum, but passively chooses to let it remain undemanded in the executor's hands, such beneficiary cannot, afterwards, claim interest upon it. *Holley v. S. G.*, 284.
3. Interest allowed on bank notes from the day of demand out of the surplus effects of a bank

in a receiver's hands; such bank having been wound up through this court, but not on the ground of insolvency. *Bank Commissioners v. La Fayette Bank*, 287.

And see, MORTGAGE, MORTGAGOR, MORTGAGEE, 4.

INTERPLEADER.

1. Although a complainant filing a bill of interpleader ordinarily gets his costs, yet where he leaves unprotected (by not making him a party) one who should have been primarily protected, *e. g.* his accommodation endorser, and compels the filing of another bill, he will not be allowed his costs. *Palmer v. Elliott*, 643.

JUDGMENT.

1. Judgments do not attach to leasehold premises unless where there is possession in the lessee (judgment debtor.) *Craig v. O'Connor*, 409.
2. Judgments are not liens in a case where a party has a lease but not the present possession and parts with the lease before the time arrives for him to enter upon the possession. *Ib.*
3. This court will not interfere with a judgment at law where a bill of discovery could have been filed, on the ground that the defendant therein can now (on account of a discharge under the bankrupt act) have the use of his co-defendant as a witness to prove his case. *Cowan v. Kingsland*, 627.

JURISDICTION.

1. Executors of a will of real and personal property had filed no inventory in New York, where part of the personalty was, and one of them was controlling the estate, and a wasting of it was alleged, while their pecuniary inability was stated, and it was suggested that coercive steps were about to be taken in the surrogate's office, (where they had, however, lately given bond on application of the present complainant,) and the bill prayed that the executors be enjoined and also suspended, and a receiver appointed. *The court held*, that the surrogate had full power in the premises, and there were not such special circumstances as made it necessary for this court to interfere on the ground of having concurrent jurisdiction. Preliminary injunction dissolved. *Whitney v. Monro*, 5.
2. A court of chancery can interfere to protect and enforce the trusts of an assignment made by a company incorporated in another state while the person or property to be acted upon is within the jurisdiction. *Barclay v. Tulman*, 123.
3. And this might be done at the instance of a creditor provided for in the assignment or by shareholders where they are to have an express benefit under it. *Ib.*
4. Where an incorporated company makes an assignment for creditors and no event has occurred giving shareholders any express benefit under it and its charter has not become surrendered, invoked or invalid, the shareholders cannot file a bill (which recognizes the assignment) to restrain the assignee in relation to the properties assigned. A voluntary assignment by a corporation or its insolvency or the non-user or misuser of its charter may lay the foundation for a direct application to vacate it; but, until the proper public officer of the state creating the corporation acts and a judgment or decree of a proper tribunal is had, the corporation remains for all the purposes of its creation and with all the legal capacity it ever possessed. *Held*, therefore, that where an incorporated company of Maryland had assets in New York and made an assignment in Maryland, in which one of the trustees under it resided within the jurisdiction of this court,

the shareholders could not file a bill, while the charter was outstanding, which recognized the trust and yet asked the court to restrain the trustees on the grounds that there was mere virtual dissolution and that the assets had become an equitable trust fund. The shareholders should first proceed in Maryland to dissolve the corporation. *Id.*

5. Chancery can act, although there may be a remedy at law: as, where repeated actions might have to be had or remedies at law are not full or adequate. *Tyack v. Bromley*, 266.
6. Although it is not proper for equity to restrain, in the first instance, where there is doubt or difficulty on the law or the facts, yet, it will restrain by injunction, without first requiring the establishment of right at law where a clear case of statutory or common law right is presented and the party is in the possession and enjoyment of a right which is daily or continually violated or threatened to be destroyed or rendered valueless. *Id.*
7. Although there may be a defence to an action at law in a matter of usury, yet, a bill will hold to compel the giving up of securities left as collateral security for the usurious debt and an injunction will be a consequence to stay the action. *Peters v. Mortimer*, 279.
8. D. was induced by the acting officer of a company to buy up 1000 shares of its stock and pledge them to the company, they advancing \$50,000 on his note therefor. The company passed away these shares as on their own account. D. remonstrated; and they gave him up the note, paid him a balance and left an unascertained amount still coming to him in the transaction. Afterwards, the same officer induced D. to let the matter, for conformity, be reinstated upon their books and to give two large notes to cover the transaction, but not by way of indebtedness. Besides this affair, D. and J. had given their joint note for a loan. The company became insolvent; and its trustees brought actions against D. on the two large notes and on the joint note. He filed a bill to restrain the actions and for an injunction: *Held*, that D.'s claim for remaining balance on the 1000 shares was not sufficiently liquidated to allow of an equitable set-off; that the joint note could not, under any circumstances, be the subject of set-off against such individual claim; and that D. had a defence at law. Temporary injunction dissolved. *Davis v. The American Life Insurance and Trust Co.*, 308.
9. Equity can control foreign executors and administrators where failure of justice or a hopeless remedy might otherwise occur, but it will not ordinarily sustain suits against them (where they have not taken out letters in this state.) *Brown v. Brown*, 343.
10. Bill for an account and to secure assets was filed by a residuary devisee and legatee residing within the jurisdiction against executors casually here but whose residence was in another state, where the will had been only proved and the testator had died. Although the principal part of the property was in that other state, there was some within New York; yet there were no special circumstances in the case. Demurrer interposed; and allowed. *Id.*
11. It is not usual for this court to grant an injunction to restrain actions in the federal courts, but leave a party to apply there to stay them until the equitable relief is granted here—confirming the case of *Schuyler v. Pelissier*, vol. 3, 191. *Coster v. Griswold*, 364.
12. The place of a testator's residence and death is the place for determining all questions that may arise respecting his personal property and its disposition and distribution, wheresoever it may be situated. *Mills v. Fogal*, 559.
13. But where a will has reference to real estate, all questions as to the will and the estate and its disposition are governed by the *lex rei sitæ*. And if a party dies intestate,

- leaving real estate, the descent and heirship are exclusively governed by the law where it is situated. *Ib.*
14. Even though an appeal from a decree made by the vice-chancellor may affect unjustly a third party (defendant)—as where a first mortgagee is fully recognized, but the mortgagor appeals so as to cover the phraseology which applies to his security and payment and obtains a stay—the vice-chancellor cannot relieve him: he must apply to the chancellor. *Westervell v. Haff*, 619.
15. A defendant at law interposed usury and affixed an affidavit to his pleas, with a seeming view to examine the plaintiff under the statute, but such affidavit was not deemed sufficient to meet the views of the act; and a verdict and judgment were had against him: *Held*, that he was too late to come into this court for relief. *Cowman v. Kingsland*, 627.
16. This court will not interfere with a judgment at law, where a bill of discovery could have been filed, on the ground that the defendant therein can now (on account of a discharge under the bankrupt act) have the use of his co-defendant as a witness to prove his case. *Ib.*
17. Where a written instrument of a former closed indebtedness remains in adverse hands, but no right of action or claim in equity exists upon it, this court will not require it to be given up. Equity exercises its power to cause written instruments to be delivered up only under special circumstances. A fear of suit is not enough, as testimony could be perpetuated; nor a charge of its affecting credit if shown about, where such credit is not mercantile. *Wilkes v. Wilkes*, 630.

L

LATENT EQUITY. See, MORTGAGE, MORTGAGOR, MORTGAGEE, 1.

LEASE.

1. A covenant to extend a lease which does not fix the amount of rent cannot be enforced in equity. *Robinson v. Kettlelas*, 67.
2. Where trustees under a will make a lease, with a covenant to renew for a certain term or to pay the value of erections which the tenant covenants to raise on the premises, the same to be valued by appraisers, but a new lease is refused and the present trustees will not agree to allow for the buildings and commence ejectment: the court can and will control the trustees and compel payment out of the trust estate. The power which equity has over trustees takes this case out of the usual rule which would leave a party to law. *Ib.*
3. Judgments do not attach to leasehold premises unless where there is possession in the lessee (judgment debtor.) *Crane v. O'Connor*, 409.
4. Judgments are not liens in a case where a party has a lease but not the present possession and parts with the lease before the time arrives for him to enter upon the possession. *Ib.*
5. A covenant to renew a lease at a certain rent, without stating what covenants the new lease should contain, does not carry any of the old covenants with it. Therefore, although an old lease contained a provision that the tenant should pay taxes and assessments, yet, as the lessor merely covenanted to make a new lease at a given rent and

said nothing about covenants: *Held*, that he must give such new lease, exclusive of a covenant, on the part of the tenant, to pay taxes and assessments. *Willis v. Astor*, 594.

LEGACY.

1. The R. S. which require an executor to elect between a legacy given for services and compensation allowed by statute, do not act retrospectively; and an executor under a will proved before 1830, is entitled to both. *Aspinwall v. Pirnie*, 410.

LIEN.

1. Judgments are not liens in a case where a party has a lease but not the present possession and parts with the lease before the time arrives for him to enter upon the possession. *Crane v. O'Connor*, 409.

LIMITATIONS. See, STATUTE OF LIMITATIONS.

LOST NOTES.

1. In relation to a loan of \$2,000, in notes of and belonging to the Bank of Buffalo, it appeared, from the testimony of clerks of the Bank of the State of New York, that the latter bank had received during a certain week \$56,526 of such notes; that they counted them, did them up into small parcels, marking each parcel and making a list, and then bundled and sealed them up; and the parcel (whatever it really contained) got safe to the bank of Buffalo—but the cashier and another clerk of the latter bank deposed positively to a deficiency in the parcel to the amount of \$2,000, from having actually counted the notes contained therein when opened, and also that, while so counting, none were purloined, mislaid or overlooked, they assorting the notes, putting those of the same denomination together, and then counting those of such denomination by themselves, setting down the number and amount on the list found in the bundle: and by adding the total together, finding the deficiency: *The Court held*, that the Bank of the State of New York should make good to the Bank of Buffalo the \$2000 of missing notes; but decreed that each bank should bear its own costs of suit. *Commercial Bank of Buffalo v. The Bank of the State of New York*, 32.

M

MILL.

1. Where the fee of a mill under lease, using water turned from a river or a mill-site for future mill purposes, is devised with the addition of "with an equal proportion of water out of Croton River Dam," the gift of such proportion of water is as permanent as the gift of the mill. *Water Commissioners and Van Cortlandt*, 545.

MORTGAGE, MORTGAGOR AND MORTGAGEE.

1. Although a mortgage may have been paid, yet, on a valuable consideration, it may be kept alive for other purposes where the rights of creditors and third persons have not

- intervened; but, although the mortgagor and mortgagee, after payment, may thus resuscitate it as between themselves, yet an assignment of it, after another mortgage by the same mortgagor is executed and recorded, will not override the latter. Nor will it have that effect as against an assignment for creditors (by the same mortgagee) also executed and recorded prior to such assignment of the resuscitated mortgage. Here is something tantamount to notice and more than a latent equity. *Purser v. Anderson*, 17.
2. Where a bond and mortgage are unimpeached by the parties to it, an after-purchaser of the premises (covered by the latter) cannot affect their amount on the ground that the mortgagee has sold and assigned them at a less amount than is secured by them. *Lovett v. Racey*, 22.
 3. An assignor of a mortgage taking, from after-purchasers who buy subject to the mortgage, an additional security and amount for forbearance, will not, thereby, invalidate the original security for usury; but, on foreclosure, he will have to give credit for such addition. *Ib.*
 4. A tender of principal and ten per cent. interest under the act of the 12th May, 1837, allowing redemption under sales of mortgaged premises, will not save ordinary interest (7 per cent.) from time of tender, where it does not appear that the amount of such tender has been lying idle. *Burr v. Stanley*, 27.
 5. A surety of a mortgage is not entitled to any notice or demand before making him a party with a view to fix him. *Rushmore v. Miller*, 84.
 6. Where a mortgagee properly holds a policy of insurance on mortgaged premises and the mortgagee sells subject to the mortgage, but the policy remains in the mortgagor's name (assigned to the mortgagee) without the buyer having had it in any way changed, and a fire happens: the mortgagee, on claiming from the insurance company, should permit the insurers to take an interest in the mortgage to the extent of the fire claim, and the buyer could have no benefit of it in any other way. *In the matter of Kip*, 86.
 7. Where a bond of a husband and a mortgage made by husband and wife are explicit as to principal becoming due in default of payment of interest within a specified number of days, the court cannot relieve from a foreclosure on default of payment of interest within the number of days fixed, although the amount may be large and the property mortgaged belongs to the wife and the debt was the husband's. Nor, on payment of interest and costs. *Hale v. Gouverneur*, 207.
 8. Although, on a mortgage of the wife's land for the husband's debt, she is as a surety and his estate, as tenant by the curtesy, will generally be decreed to be sold first, yet, when the sale of it cannot possibly make the amount due, the whole interest of the husband and wife will be sold together. *Ib.*
 9. The recording of a second mortgage is not constructive notice to a mortgagee of a first registered mortgage. *Wheelwright v. Loomer*, 232.
 10. Although there may be a second mortgagee, yet a first mortgagee, who has no knowledge or information of it, does not, by releasing a part, affect his rights over the balance of the premises. *Ib.*
 11. Where a husband mortgages his own property for his own debt and, at the same time, the wife joins her husband in mortgaging to the same mortgagee her property for the same debt; and, afterwards, the mortgagee buys the husband's mortgaged premises and pays him the purchase money (not crediting it on the mortgage) and thereby the husband's mortgage merges, the mortgagee, in an attempt to foreclose on the wife's property, will have to credit the amount at which he bought the husband's property. This is held on the ground that the wife is a surety and that the creditor must first resort to

the primary fund and relieve the surety as far as possible, and can do no act to impair the benefit of substitution without express consent. And where, in such a case, a mortgagee (holding two such mortgages,) had—when calculating the amount of purchase of the husband's premises and otherwise—from the mortgages generally—been satisfied, but filed a bill to foreclose and sell the wife's property, insisting on a balance and that the husband's mortgage was merged and that the matter of purchase was not to be taken into account; and another, after-mortgagee, who had advanced money to the heir of the wife, filed a cross-bill; *it was held*, that the mortgagee filing the foreclosure bill took nothing and should be dismissed, paying costs; and that, in the cross suit, a sale should be had to satisfy the mortgagee filing such cross-bill. *Wheelwright v. Loomer*, 232.

12. Where a bond and mortgage are given on a settlement of accounts, balances being struck and assented to at the time, they are *prima facie* evidence of the amount; and when the mortgagor denies the extent of the amount, the burthen of proof is on the latter—on the principle of surcharging and falsifying. And where (as in the case before the court) there is no general order or decree throwing open the accounts and allowing a general accounting, the defendant is only at liberty to surcharge and falsify as to the particular items pointed out by his answer; and cannot have the benefit of error in other items, although, on a reference, they may be apparent. *DeMott v. Benson*, 297.
13. Bill by mortgagor not setting forth the origin of the debt, but the answer showing how it was made for a balance of account, yet denying the amount to be due:—In such a case,—the court having arrived at the conclusion that such was its origin. *It was held*, that the onus of proof, to rebut amount, was on the defendant. *Ib.*
14. Where a mortgage is given professedly for an account which had yet to be adjusted and the mortgagor, by his answer, showed that he had repeatedly attempted to obtain a settlement without effect and denied that any thing like the amount claimed is due, it is incumbent on the mortgagee to produce accounts and evidence to make out the amount. *Ib.*
15. N. G. C. owed the Manhattan Co.; and on the 15th December, 1836, gave them his bond and mortgage on real estate. On the 12th March, 1841, they foreclosed, sold and bought in; and there was a deficiency for which (under a transcript of their decree) they issued a *fi. fa.* which was returned *nulla bona*. On the 9th of October, 1838, the said N. G. C. had made a deed of trust, embracing the mortgaged premises, upon trust for the trustee to sell subject to mortgages or free from incumbrances and paying them off out of purchase money and in the mean time collect rents; and after payment of taxes and other ordinary charges, upon trust to pay, first, The Greenwich Bank a specified sum; and, afterwards, certain other creditors. The trustee collected and held rents; and the Manhattan Company now filed their bill, claiming them to make up the balance due them under the foreclosure. *Held*, (on a general demurrer interposed) that the rents which the trustee received were not a trust fund to keep down interest and that they belonged to the Greenwich Bank and should be paid in part of their debt. *Manhattan Company v. Greenwich Bank*, 315.
16. A mortgagee obtains a specific lien upon rents, by diligently obtaining the appointment of a receiver; and a second or third mortgagee may, thus, get an advantage of the first mortgagee as to rents collected. *Post v. Dorr*, 412.
17. Bill of foreclosure and notice of *lis pendens* filed forty days before decree while the statute of May 14th 1840 (dispensing with judgment-creditors as parties) was in force; but the decree was had after the act of May 7th 1844, (which annulled the § so dispensing with judgment-creditors as parties) was passed: *Held*, under the circumstances, that there

- was no necessity to make intervening judgment-creditors parties. *Wood v. Oakley*, 562.
18. *It seems*, that it might be different if forty days from the time of filing notice of *lis pendens* had not elapsed when the repealing law took effect. *Ib.*
19. And in bills filed since the 6th of June 1844 (when this repealing act took effect) judgment-creditors are to be made parties. *Ib.*
20. The statute incorporating the Farmers' Loan and Trust Co. (which allowed loans on bond and mortgage) declared that the act should expire at the end of fifteen years, except as to insurance on lives and the granting of annuities. By an act passed shortly before such expiration, a new name was given to the company and its existence (without fresh powers) was thereby continued. After this last act went into effect and after the expiration of the fifteen years, the company advanced on bond and mortgage. And the court *Held* that, as the power to make insurances on lives and the granting of annuities was saved, the company must have funds to apply to them and might invest in order to carry on such business; and, therefore, they were justified in such advance and the same would be presumed to have been done in the ordinary course of its business. *Farmers Loan and Trust Co. v. Clones*, 575.
21. A solicitor, who had been long employed by a client, was applied to for the purpose of finding security for money. At first he was not successful; but, afterwards, he suggested having of his own properties, certain "very excellent" bonds and mortgages, but did not describe them or give the names of the mortgagors; and the client, at once, sent word that he could have the money. Whereupon, the solicitor sent his clerk with the bonds and mortgages and assignments thereof duly acknowledged; and the client gave his check. The latter, for some time, received the interest on them. The mortgagors in one or more of the cases had conveyed away the premises, subject to the mortgages. This was particularly the case as to one, where the interest was in arrear at the time the client received them and the mortgagor was insolvent soon afterwards. The property in this particular mortgage consisted of vacant lots and the ultimate holders at last refused to pay any more interest; and taxes and assessments came in arrear. No fraud was proved. The transaction occurred in February 1838 and the bill for relief was filed in May 1842. *Held*, that the solicitor was bound to take back this bond and mortgage and restore the amount paid for it, with interest, and reimburse prospective payments for taxes and assessments. *Lewis v. J. A.*, 601.
22. G. agreed to advance money in ten instalments as buildings progressed; and took a mortgage to secure the whole amount. He made eight payments; assigned his agreement; and foreclosed on default of payment of interest. O. advanced the two last instalments on the strength of such agreement; and they were applied by the contractor to finish the buildings. The mortgagor, between the times of payment of the first and second instalments, had given a mortgage to L.; and a judgment was had against him before all the instalments were exhausted. On a reference to ascertain who were entitled to a surplus arising on the sale under G.'s mortgage: *Held*, that O. was (protectively under G.'s mortgage) entitled to priority for the two last instalments. *Griffin v. Burnett*, 673.
23. Deed of the 5th of October 1831, executed by husband and wife in consideration of the grantee, who was the wife's mother, releasing dower in the daughter's land. It had been acknowledged and left in possession of the daughter for the mother. After the death of the daughter's husband, the deed was found mutilated by having had the signatures of the grantors and subscribing witnesses cut out. After this (on the 17th of January 1845) it was recorded: *The court held*, that it was to be taken as an executed and delivered deed; but that as the grantors continued in possession exercising all acts of owner-

ship, the grantee was affected by subsequent instruments and that an after mortgage by this husband and wife, recorded before the mutilated deed got upon the record, had a preference. *Frost v. Peacock*, 678.

24. Where a wife joins with a husband in a mortgage of his lands and he dies after sale in foreclosure and after confirmation of the report of such sale, she will not be entitled to any amount by way of dower out of any balance of the avails of the sale. *Ib.*
25. Where a person buys a portion of lands mortgaged and there is a surplus on foreclosure, he will not be allowed thereout the amount he purchased at, but only to as much as his portion contributed to the sale. *Ib.*

MUTILATED DEED. See, DEED, 12.

N

NE EXEAT.

1. A person who comes into this state for the express and sole purpose of giving testimony as a witness in an action at law, even where he has had no *subpoena* to testify served on him after arrival, cannot be taken on a writ of *ne exeat* while waiting to give evidence. *Dixon v. Ely*, 557.

NOTICE.

1. *It would seem* that the filing of a judgment creditor's bill is a constructive notice of his *pendens*, sufficient to affect a purchase of the debtor's furniture made *pendente lite*. *Scudder v. Van Amburgh*, 29.
2. A party who claims as a purchaser without notice must set it up by answer or plea, and cannot avail himself of it by a demurrer to a pleading which explains and goes against the purchase. *Ib.*
3. The recording of a second mortgage is not constructive notice to a mortgagee of a first registered mortgage. *Wheelwright v. Loomer*, 232.
4. Although there may be a second mortgage, yet a first mortgagee, who has no knowledge or information of it, does not, by releasing a part, affect his right over the balance of the premises. *Ib.*

And see, MORTGAGE, MORTGAGOR, MORTGAGEE, 1.

NUISANCE.

1. Preliminary injunction refused to stop a Rail Road Company from completing a tunnel through a city authorized by the civil authorities of the place—on an allegation of nuisance by an owner of adjoining property on the same line. *Hodgkinson v. The Long Island R. R. Co.*, 411.

P

PARTITION.

1. A report of commissioners in partition will not be disturbed, save for causes which, at law, would allow of a new trial. *Livingston v. Clarkson*, 596.
2. And such a report will be regarded with more respect than a verdict where the commissioners were selected by the parties in interest and with particular reference to their qualification. *Ib.*
3. A tenancy by the curtesy initiate is a sufficient estate in lands upon which to base a partition suit. *Riker v. Darke*, 668.

And see, DEED, 2; VENDOR AND PURCHASER, 6.

PARTNERSHIP.

1. Where, on a dissolution of a partnership, it is consented that two of the partners shall have charge of its properties and wind up the concern, their possession is not to be lightly interfered with. There must be palpable breach of contract or duty or act amounting to fraud or an endangerment of property or rights of the withdrawing partner. The latter cannot intercept their proceedings under mere apprehension of loss or because he may think they have not acted discreetly or judiciously. *Walker v. Trott*, 38.
2. Although there may be a partnership in the use and working of land, there cannot be one in the buying and selling of real estate, so as to carry with it the rights, powers, duties and responsibilities of partners under the law merchant. *Patterson v. Brewster*, 352.
3. Where an association is formed for the purchase, sale and improvement of real estate and its trustees (pursuant to its articles) effect sales and buy in their own names individually and so give their own bonds and mortgages, a seller cannot follow the associates where the trustees become insolvent. It might be otherwise, however, where the sale was made on the credit of the capital of the association and on that of the parties where their shares have not been paid in. A right to sue on an original simple contract indebtedness is merged when a higher security is taken, for example, a bond and mortgage. *Ib.*
4. The fact of the death of some shareholder in an association does not create a difficulty sufficient to justify a suit in equity in order to make all contribute to pay a debt. *Ib.*
5. Where, on a dissolution of copartnership, one partner assigns all his rights in its stock and properties to the other and the latter covenants to apply such stock and properties to the debts of the firm, its creditors may follow it for that purpose, notwithstanding the receiving partner makes divers transfers of it in fraud of the creditors and even though both parties are applicants under the bankrupt law. The effects become a trust fund for the creditors under the covenant. *Wildes v. Chapman*, 669.

PLEADING.

Pleading generally.

1. A party who claims as a purchaser without notice must set it up by answer or plea, and cannot avail himself of it by a demurrer to a pleading which explains and goes against the purchase. *Scudder v. Van Amburgh*, 29.
2. On a bill to get back goods on the ground that they were obtained by false pretences and on a fictitious sale, the defendant, under the statute to compel defendants to answer

bills in certain cases, (Session's Laws of 1833, p. 17,) must answer as to the alleged false pretences. *Siffkin v. Manning*, 37.

Answer.

1. A defendant who denies all interest in property, cannot be compelled to answer as to its after-value or contents. Thus, where a judgment-creditor charged fraud and that the defendant had an interest in a stock in trade and alleged its value, and the defendant showed he had no interest in it after a certain day and which was prior to filing the bill: *Held*, that he need not answer as to its value or as to the contents. *Toker v. Slosson*, 114.
2. A solicitor who is made a defendant, and who desires to protect himself from answering on the ground of confidential communication, must distinctly show that his knowledge and information came solely from his client. He is not exempt, merely because he obtained it while engaged in business for his client. And should he afterwards become the executor of his client and he is made a defendant to reach the property which had been held by such client, the privilege would cease and he must answer in connection with it. *Crosby v. Berger*, 254.
3. No necessity, in answering a judgment creditor's bill, to discover as to property coming to defendant up to filing the answer. All a complainant can do is to require a discovery (up to that late time) of the mere condition of the property which the defendant had when the bill was filed. *Hope v. Brinckerhoff*, 349.
4. Matter in an answer complaining of acts of the complainant, but which cannot avail the defendant in the suit, is impertinent. *Lawrence v. Lawrence*, 357.
5. Repetition is impertinence. *Ib.*
6. Where a complainant, as administrator, had been the professional adviser of the defendant and a deed, made and executed while the professional relation existed, might come into question in this suit, the defendant was allowed, in his answer, to set up the fact of such relationship; although it would have been better to have objected in the surrogate's office to the appointment of that person as administrator. *Ib.*
7. Matter repeated in an answer is impertinent. *Waring v. Suydam*, 426.
8. A defendant who assumes to answer the whole of a bill of discovery cannot stop short and submit to the court whether he is bound to answer particular parts. Such submission will be adjudged impertinent. In order to protect himself he should demur to such parts and properly, in form, answer only to the remainder. *Ib.*
9. An exception for impertinence, which covers more than should be expunged, makes the whole exception nugatory. *Ib.*
10. A clause in an answer, although somewhat argumentative and prolix, will not be deemed impertinent where it may have a bearing on costs. *Ib.*
11. A defendant who submits to answer a bill of discovery generally, cannot, by answer, protect himself from discovery by insisting that matters in the bill are impertinent and the complainant has no right to the discovery. If the proposed discovery is such that the defendant is not bound to make or the complainant has not a right, from the nature of the case, to call for it, the defendant should demur or if the discovery, when made, would be immaterial and unnecessary as evidence, the defendant may refer the bill for impertinence. *Ib.*
12. Where the insolvency of defendant L. is positively alleged, it will amount to impertinence for defendant R. to undertake to show the contrary by hypothetical statements and the opening of long settled accounts and adjusted balances. *Jones v. Roberts*, 611.

13. An answer overrules a demurrer when the defendant does not restrict his answering to the parts not covered by it. Thus, it is done where the defendant commences paragraphs with "And this defendant further answering the said bill of complaint says, &c." *Bruen v. Bruen*, 640.

Bill ; Bill of Discovery ; Supplemental Bill ; and, Bill of Revivor.

1. A bill cannot be so amended in its prayer as to change its object. *Curtis v. Leavitt*, 246.
2. A defendant in a bill filed by a judgment-creditor cannot be compelled to discover property to a later date than the filing of the bill. If a discovery to a later date is required, a supplemental bill should be filed. *Gregory v. Valentine*, 282.
3. Where the matter of a second (former suit going on) is incidental to the matter of the first, although not embracing so much, a plea of former suit pending will hold. The complainants in the first suit should amend or put in the incidental matter in a supplemental bill. *Dickinson v. Codwise*, 341.
4. Where an answer shows property acquired after a bill filed, a supplemental bill is necessary to reach it and the particulars of it. *Hope v. Brinckerhoff*, 348.
5. Where a right to property comes to a judgment creditor before bill filed, but administration to it takes place afterwards, the same may be reached by a supplemental bill making the administrator a party, although it might be that a complainant, knowing of the right, could have amended and compelled an assignment of it to a receiver. *Ib.*
6. A defendant, interested in three distinct suits, cannot, on abatement, revive all three by one bill of revivor and supplement. *McDermott v. McGown*, 592.
7. Where a bill is filed in relation to alleged frauds in a particular matter, the complainant may charge contemporaneous frauds by the defendant in which the complainant has no interest; and this has to be answered. A demurrer will not hold to it. *Bruen v. Bruen*, 640.
8. Where a judgment debtor is entitled to a share of personalty by the death of a relation, and such death happens before the filing of a creditor's bill, but administration on the estate of the decedent takes place afterwards: *Held*, that a supplemental bill might be filed to impound the fund, although the creditor, had he known of the debtor's right to the fund, might have brought it in by an amendment to the original bill. *Hope v. Brinckerhoff*, 660.

And see, PLEADING, ANSWER, *Ante*, 8, 11.

Demurrer.

1. Where complainants have a common interest in all the matters of the bill and the defendants are concerned only in portions and a demurrer is interposed for multifariousness, the court will look to convenience and expediency and use its discretion as to a dismissal of the bill. *Carroll v. Roosevelt*, 211.
2. Where a demurrer, put in with an answer, is not restrictive in its heading, it is bad: therefore where the caption was: "The demurrer and answer of G. W. B. and J. B. B., defendants to the bill, &c." held bad in form. *Bruen v. Bruen*, 640.
3. An answer overrules a demurrer when the defendant does not restrict his answering to the parts not covered by it. Thus, it is done where the defendant commences paragraphs with "And this defendant further answering the said bill of complaint says, &c." *Ib.*

4. Where a bill is filed in relation to alleged frauds in a particular matter, the complainant may charge contemporaneous frauds by the defendant in which the complainant has no interest; and this has to be answered. A demurrer will not hold to it. *Ib.*

Exception.

1. An exception having no point and which, therefore, would compel the court to find out what was required to be answered, will be disallowed. *McKeen v. Field*, 379.
2. Where several exceptions are taken for impertinence when one only should have covered the matter, the court will, as to costs, look at it as one exception merely. *Renwick v. Mack*, 380.

Impertinent Matter.

See, PLEADING, ANSWER, *Ante*.

Injunction.

1. An injunction should not refer the defendant to the bill for any of the matter enjoined. This, however, would not excuse an infringement, if a defendant had knowledge *dehors* the injunction. *Byam v. Stevens*, 119.
2. Where there may have been but a constructive infringement of an injunction and the nature of the suit is such as to make it difficult to calculate damages, the court will refuse an attachment and leave the chance of injury to be embraced in the decree. *Ib.*
3. Where the defendants are aliens and proceed to remove the cause into the circuit court of the U. S. under the act of congress, the granting an injunction on motion for its infringement will not be ground for keeping a cause in this court. *Ib.*

And see, INJUNCTION, GENERALLY.

Multifariousness.

See, PLEADING, DEMURRER, *Ante*, 1.

Parties.

1. A party not affected by another's being made a defendant, cannot demur because the latter is wrongly made a party. *Crosby v. Berger*, 210.
2. Where a bill charges that shares of stock have, by fraudulent conduct of one person, got into the possession of two, the latter may be proceeded against in one suit, although they each hold a distinct number of shares; and it is also right to make the wrong doing person a party. *Bank of America v. Pollock*, 215.
3. Where a clerk in a bank improperly obtained the check of customers and dishonestly drew out money, knowing it caused an overdrawing and bought stocks and absconded: *Held*, that these customers were not necessary parties in a bill filed by the bank to reach the stock. *Ib.*
4. Although the court may not choose to stay executors and trustees from making sales of real estate authorized in words by a will on a bill filed by a remainder-man entitled to an unascertained share, yet it can secure the purchase-money during a life estate on the principle of *quia timet*. But to do so, all parties in remainder must be before the court, unless the bill be filed by one on behalf of all having similar rights. As must a trustee

- who has not accounted; as well as a person having a lien upon the complainant's share. *Champlin v. Champlin*, 228.
5. Where a right to property comes to a judgment debtor before bill filed, but administration to it takes place afterwards, the same may be reached by a supplemental bill making the administrator a party; although it might be that a complainant, knowing of the right, could have amended and compelled an assignment of it to a receiver. *Hope v. Brinckerhoff*, 348.
 6. Where a complainant, in a judgment creditor's suit, takes the benefit of the bankrupt act, the same becomes defective and can only be proceeded in by his assignee filing a supplemental bill. *It seems*, that if the assignee refused to do this, the original complainant might proceed making such assignee a defendant. *Springer v. Vanderpool*, 362.
 7. Bill of foreclosure and notice of *lis pendens* filed forty days before decree while the statute of May 14th 1840 (dispensing with judgment-creditors as parties) was in force; but the decree was had after the act of May 7th 1844, (which annulled the § so dispensing with judgment-creditors as parties) was passed: *Held*, under the circumstances, that there was no necessity to make intervening judgment-creditors parties. *Wood v. Oakley*, 562.
 8. *It seems*, that it might be different if forty days from the time of filing notice of *lis pendens* had not elapsed when the repealing law took effect. *Ib.*
 9. And in bills filed since the 6th of June 1844 (when this repealing act took effect) judgment-creditors are to be made parties. *Ib.*

Plea.

1. On the point of a plea of another suit pending, the court looks to see whether the bills are substantially for the same cause and for the like object. On the dismissal, at a proper stage of the first bill, the court will allow the second to stand. *The American Bible Society v. Hague*, 117.
2. M. H., by plea, set up that he was, with the knowledge of the complainants, a surety only on the notes of J. W. H. and J. A. M.; that, after judgments against him and them obtained by the complainants on the notes, the latter, by written agreement with the said J. W. H. and J. A. M. and without his (M. H.'s) consent compromised for \$30,000 (including the judgments), giving upwards of four years within which to pay and covenanting not to sue them in the meantime; and also, during such time, receiving \$5,000 in part of the \$30,000. *Held*, that the mention of the \$5000 did not render the plea bad for duplicity; and that such plea was a good plea. *Delaplaine v. Hitchcock*, 321.
3. Where a master finds in favor of a plea of former suit pending and the complainant is dissatisfied, his course is to except to the report and, in this way, bring the matter before the court. *Dickinson v. Codwise*, 341.
4. Where the matter of a second (former suit going on) is incidental to the matter of the first, although not embracing so much, a plea of former suit pending will hold. The complainants in the first suit should amend or put in the incidental matter in a supplemental bill. *Ib.*
5. On a bill filed in the name of a company and J. B. and L. O. B. and the bill stating that the latter were the assignees of the company, a plea was interposed, denying that they were assignees and setting forth matter showing that, in a decree in another suit, their assignment was set aside and the property of the company was in receivers hands: *Held*, that this showing did not amount to duplicity. *Southern Life Insurance & Trust Company v. Davis*, 588.

6. *Also held*, that if it had been a mere naked plea of the decree, without an averment of its remaining in force, the plea would have been bad; but the positive averment that the said J. B. and L. O. B. were not assignees, coupled with the above (first mentioned) statement as to the decree, carried a sufficient implication that the decree was in force—and the plea was allowed. *Id.*
7. On the master reporting a plea as true, the complainant can except on the point of the truth in fact. The proceedings referred to by plea are produced; and if the exception be overruled, the plea stands for argument as to the question of its being a bar. *Wilkes v. Henry*, 672.

POLICY OF INSURANCE.

1. Where a mortgagee properly holds a policy of insurance on mortgaged premises and the mortgagee sells subject to the mortgage, but the policy remains in the mortgagor's name (assigned to the mortgagee) without the buyer having had it in any way changed, and a fire happens: the mortgagee, on claiming from the insurance company, should permit the insurers to take an interest in the mortgage to the extent of the fire claim, and the buyer could have no benefit of it in any other way. *In the matter of Kip*, 86.

And see, VENDOR AND PURCHASER, 6.

PORT WARDENS.

1. The act of the legislature of the 19th February, 1819, authorized a board of port wardens, under the style of the master and wardens of the port of New York, with a common seal and who should have an office and clerk and power to survey vessels deemed unfit for sea and to judge of their necessary repairs to perform the voyage and to inspect sales of vessels and goods arriving damaged and required to be sold for the benefit of underwriters out of the city of New York and to grant certificates and receive fees and their appointment making them public officers: *Held*, that they had exclusive right to perform the duties specified by the act. And, that an association of persons advertising to survey ships and merchandize, setting up an office close by that of the port wardens and calling themselves "Marine surveyors for the port of New York, appointed by the chamber of commerce and board of underwriters," and giving out that they performed the same duties as the port wardens and that their acts would be more authentic than those of the port wardens, had no right to execute any of the statutory duties appertaining to the office of the latter. And, *it seems*, they had brought themselves within the principles of the cases connected with simulated devices and deceits. *Tyack v. Bromley*, 258.

PRACTICE.

Amendment.

1. A bill cannot be so amended in its prayer as to change its object. *Curtis v. Leavitt*, 246.
2. Affidavits, denying the truth of matter proposed to be inserted in a bill by way of amendment, form no sufficient objection to the application to amend. *Coster v. Griswold*, 364.
3. Proposed amendments, by executors, to a bill filed by their testator, can be allowed, although embracing statements which may never have been made by him and although they render no excuse for their not having been brought forward originally. *Id.*

4. *It would seem*, that less strictness should be allowed in amending a bill where no injunction is in force or necessary to be sustained. *Ib.*
5. Where a judgment debtor is entitled to a share of personalty by the death of a relation, and such death happens before the filing of a creditor's bill, but administration on the estate of the decedent takes place afterwards: *Held*, that a supplemental bill might be filed to impound the fund, although the creditor, had he known of the debtor's right to the fund, might have brought it in by an amendment to the original bill. *Hope v. Brinkerhoff*, 660.

Appeal.

1. Even though an appeal from a decree made by the vice-chancellor may affect unjustly a third party (defendant)—as where a first mortgagee is fully recognized, but the mortgagor appeals so as to cover the phraseology which applies to his security and payment and obtains a stay—the vice-chancellor cannot relieve him: he must apply to the chancellor. *Westervelt v. Haff*, 619.

Calendar.

1. On exceptions to a master's report in relation to the rights of claimants upon surplus in a mortgage case, the same must be put on the calendar and cannot be disposed of by motion. *Eagle Fire Ins. Co. v. Flanagan*, 559.

Contempt.

1. The defendants had, through newspapers, misrepresented the decision of the court in relation to a modification of an injunction as well as the views expressed by the Vice-Chancellor in making the decision; but, as the court considered the misconduct hardly came under criminal contempts, (1 R. S. 278, § 10, 11,) and it was not clear that it amounted to an act by which the rights or remedies of the complainants might be defeated, impaired, impeded or prejudiced (2 R. S. 534,) and as the defendants made a reasonable explanation, the court allowed the defendants to go free. *Morrison v. Moat*, 25.
2. Where there may have been a constructive infringement of an injunction and the nature of the suit is such as to make it difficult to calculate damages, the court will refuse an attachment and leave the chance of injury to be embraced in the decree. *Byam v. Stevens*, 119.

Costs. See *Costs, generally.*

Damages.

1. Items of damage allowed on a bond given under the 31st rule on granting an injunction to restrain the sale of mortgaged premises. *Edwards v. Bodine*, 292.

Decree.

1. The court can settle a decree without the necessity of a notice of settlement or on short notice. *Twinsend v. Low*, 249.
2. It is not regular for a master to sign his report without first issuing a warrant to settle. But, where a copy of report and order of confirmation have been served and decree enrolled, the neglect to serve the warrant to settle will not, alone, be sufficient to open the proceedings. *Ib.*

3. Where a decree fixes the *data* for computation, the master should not depart from it. Still, where a master did so and it was beneficial to the defendant, the latter could not take advantage of the irregularity. But where it was done and the execution on it was, in amount, (wrongly) against the defendant, the court put it to the complainant to relinquish the improper excess, or to consent to waive the decree. *Id.*
4. Where a defendant, in a bill for an account, has put in his answer without oath and does not show facts which he wishes to give in evidence or what witnesses, in particular, it will be important for him to examine, a decree, taken by default, will not be opened to give him the privilege of going back to proof. *Id.*
5. Where it is very doubtful whether executors have power to make a mortgage under which there has been a foreclosure sale and enrolled decree and the testator, making the will, left infant children who had appeared by a guardian *ad litem*, but the latter had only put in a general answer and had not raised any defence and the purchaser of the property refused to take, fearing the children's rights: *The court* allowed the decree to be opened and decree vacated, with leave for the infants (one of whom had come of age) to put in a new answer to set up the defence of the invalidity of the mortgage. *Curtis v. Ballagh*, 635.

Demurrer.

1. Where an order *pro confesso* is set aside as to non-resident defendants by the court—and they have time “to answer,” they may interpose a demurrer within the time so allowed. It places them in the same situation as a defendant who is under the usual order to answer in forty days. *Garr v. Ogden*, 625.

Examiner's Fees.

1. The court will not, on petition, compel a solicitor to pay an examiner's bill, but leave the latter to his remedy at law. *Curtis v. Engle*, 117.

Exception.

1. An exception to a master's report, depending on matter of fact which does not appear upon its face, must be overruled. *De Mott v. Benson*, 297.

Fees. See, *Practice, Master's Fees, post.*

Feigned Issue. See, *Evidence*, 7.

Injunction.

1. Where an injunction bill is filed with affidavits annexed and an answer on oath is waived, but the same is put in under oath and strong affidavits also are read in support of a motion to dissolve the injunction, the dissolution is not a matter of course, especially where proofs may have to be taken before a correct decision can be had. *Mead v. Richards*, 667.
2. An injunction is not to be granted on filing a bill, where it is not essential to secure rights and where the filing of a notice of *lis pendens* will answer. *Waddell v. Bruen*, 671.
3. Injunction dissolved where the allegations embracing the equity are on information and belief. *Id.*

And see, *INJUNCTION, GENERALLY.*

Master's Fees.

1. Fees which are and are not allowed. *Kerr v. Develin*, 55.

Master's Report.

1. It is not regular for a master to sign his report without first issuing a warrant to settle. But, where a copy of report and order of confirmation has been served and decree enrolled, the neglect to serve the warrant to settle will not, alone, be sufficient to open the proceedings. *Thiessen v. Low*, 249.
2. Where a decree fixes the data for computation, the master should not depart from it. Still, where a master did so and it was beneficial to the defendant, the latter could not take advantage of the irregularity. But where it was done and the execution on it was, in amount, (wrongly) against the defendant, the court put it to the complainant to relinquish the improper excess, or to consent to waive the decree. *Id.*
3. Where there is a reference to a master simply as to whether the complainants can cause to be made to the defendants a perfect title, clear of incumbrances, the master, in strictness, is not bound to report any thing more than that; but it is more satisfactory that he should show how, or in what manner, the complainants could cause a good title to be made. *Scott v. Thorp*, 1.
4. An irregularity in a master's office, in a matter of practice connected with his report, is to be corrected by motion and not through an exception. *DeMott v. Benson*, 297.
5. In matters of account before a master, the defendant's answer (on oath) is evidence so far as it is responsive to the complainant's bill. *Id.*
6. An exception to a master's report, depending on matter of fact which does not appear upon its face, must be overruled. *Id.*

Order for Further Answer.

1. An order may be entered for a further answer upon exceptions for insufficiency submitted to, before exceptions taken for impertinence are disposed of. *Lawrence v. Lawrence*, 357.

Receiver.

1. A receiver is not to be discharged on his own application, where his duties are not ended, unless he shows good cause, especially where it might affect parties. His mere desire, though coupled with a statement of complication of accounts and the necessity of losing much time in the business of his receivership, is not sufficient. *Beers v. The Chelsea Bank*, 277.

And see, RECEIVER, GENERALLY.

*Report. See, Partition, 1, 2.**Resale.*

1. Where a resale is ordered and that the defaulting buyer make up any deficiency, he will not be let up merely on account of a variation of the original terms of sale in regard to the per centage of deposit—especially where he attends on the resale and is a bidder. *Bibby v. Gouverneur*, 535.

Revivor.

1. A defendant cannot revive by bill before decree or decretal order giving a vested interest. *McDermott v. McGown*, 592.

Supplemental Bill. See, (*Practice*) *Amendment, ante.*

PRINCIPAL AND SURETY.

1. Where separate suits are brought and separate judgments obtained against maker and endorser of a promissory note and the endorser pays the amount, he is entitled to the note and all the benefit of the judgment and execution as against the maker. *Davis v. Perrine*, 62.
2. *Same principle* where drawer and endorser are jointly sued under the statute of 1830; and an endorser of a note having to pay (on a joint judgment obtained against him and the drawer) may take an assignment from the plaintiff in the action and use it as a subsisting judgment, for his indemnification, as against the drawer. *Ib.*
3. But, where there is a judgment on a bond against co-obligors, one of them being a surety, the bond merges in the judgment and the surety can have no redress back against the principal obligor under such bond or on the judgment. *Ib.*
4. Although the liability of a surety is reduced to a judgment against him, yet, his rights of subrogation and substitution continue; and the creditor cannot give time to the principal without discharging the surety. *Delaplaine v. Hitchcock*, 321.
5. M. H., by plea, set up that he was, with the knowledge of the complainants, a surety on the note of J. W. H. and J. A. M.; that, after judgments against him and them obtained by the complainants on the notes, the latter, by written agreement with the said J. W. H. and J. A. M. and without his (M. H.'s) consent compromised for \$30,000 (including the judgments) giving upwards of four years within which to pay and covenanting not to sue them in the meantime; and also, during such time, receiving \$5,000 in part of the \$30,000. *Held*, that the mention of the \$5,000 did not render the plea bad for duplicity; and that such plea was a good plea. *Ib.*
6. In the absence of fraud or failure of title, a surety, who guarantees notes given on the purchase of lands, cannot be relieved on the ground of hardship, inadequacy of consideration or extravagance of price. *Coster v. Griswold*, 364.
7. Where a purchaser covenants and makes a pledge that the lands he sells shall, within a certain period, command a certain price and this is shown to have been impracticable and he becomes insolvent and his pledge inadequate, an equity arises in favor of the buyer, as well as of his surety, on notes given for the purchase money, so long as such notes remain in the hands of the seller on a bill *quia timet*. But, if an absolute assignment of the notes, in good faith, has taken place, for consideration, before causes for filing the bill arise or a right of set-off attaches or other equitable claim occurs, the assignee can hold irrespective of any after accruing right or equity. In such case, the court secures the equities which the debtor had against the original creditor up to the time of the assignment. And such equities are not lost by a mere pledge of the notes by the seller—they continue up to and until a *bona fide* assignment as aforesaid. *Ib.*

PURCHASER WITHOUT NOTICE. And see, NOTICE, 2.

Q

QUIA TIMET.

1. Although the court may not choose to stay executors and trustees from making sales of real estate authorized in words by a will on a bill filed by a remainder-man entitled to an unascertained share, yet, it can secure the purchase money during a life estate on the principle of *quia timet*. But to do so, all parties in remainder must be before the court, unless the bill be filed by one on behalf of all having similar rights. As must a trustee who has not accounted; as well as a person having a lien upon the complainant's share. *Champlin v. Champlin*, 228.
2. Where a purchaser covenants and makes a pledge that the lands he sells shall, within a certain period, command a certain price and this is shown to have been impracticable and he becomes insolvent and his pledge inadequate, an equity arises in favor of the buyer, as well as of his surety, on notes given for the purchase money, so long as such notes remain in the hands of the seller on a bill *quia timet*. But, if an absolute assignment of the notes, in good faith, has taken place, for consideration, before causes for filing the bill arise or a right of set-off attaches or other equitable claim occurs, the assignee can hold irrespective of any after accruing right or equity. In such case, the court secures the equities which the debtor had against the original creditor up to the time of assignment. And such equities are not lost by a mere pledge of the notes by the seller—they continue up to and until a *bona fide* assignment as aforesaid. *Coster v. Griswold*, 364.

R

RAIL ROAD.

1. Preliminary injunction refused to stop a rail road company from completing a tunnel through a city authorized by the civil authorities of the place—on an allegation of nuisance by an owner of adjoining property on the same line. *Hodgkinson v. Long Island R. R. Co.*, 411.

RECEIPT.

1. In construing a receipt which embraces several sums, the words with which it ends may be made to qualify the first sum and is not, necessarily, to be confined to the last antecedent. *Bogart v. Van Velsor*, 719.

RECEIVER.

1. Trust deed set aside on the complaint of a receiver, as the court considered the trustees so placed that they could not well do otherwise than defend it; and yet, as the fact was that they were not strangers to the transactions out of which it arose, and accepted the trust knowingly, they were decreed to bear their own costs, and the receiver was allowed his costs out of the fund. *Leavitt v. Yates*, 134.
2. A receiver is not to be discharged on his own application, where his duties are not ended, unless he shows good cause, especially where it might affect parties. His mere

desire, though coupled with a statement of complication of accounts and the necessity of losing much time in the business of his receivership, is not sufficient. *Beers v. The Chelsea Bank*, 277.

3. Where an injunction is granted and a receiver is appointed and no motion is made to dissolve the one or to get rid of the latter, an objection raised at an after-period of the cause against either, as having been improperly allowed, will not be regarded. *Post v. Dorr*, 412.
4. The order allowing a receiver which is not modified or discharged becomes the law of the case as to the right to have one; and the application of the funds in his hands necessarily follows through him. *Id.*
5. A mortgagee obtains a specific lien upon rents, by diligently obtaining the appointment of a receiver; and a second or third mortgagee may, thus, get an advantage of the first mortgagee as to rents collected. *Id.*
6. Where a receiver files a bill, his solicitor should not be the same person who has acted in the original suit. It might be ground to dismiss it. But in a case of the kind and where also the defendant's solicitor was the same as the original defendants had employed and he entered an appearance knowingly and without moving beforehand, the bill was not dismissed on motion. The receiver, however, was ordered to get another solicitor and to pay the costs of the motion. *Warren v. Sprague*, 416.

And see, INJUNCTION, 11.

RELIGIOUS CORPORATION.

1. In a mixed (German and English) Congregation of a German Lutheran Church, one party cannot, on the resignation of its particular pastor, agree with another church that it may bring in its pastor and congregation as a body corporate, with its church establishment. They may invite a minister and individuals to attend and so increase their number. *Cammeyer v. German Lutheran Churches*, 223.

RENTS. See, MORTGAGE, MORTGAGOR, MORTGAGEE, 15.

RE-SALE. See, SALE, RE-SALE.

REVIVOR. See PLEADING, BILL, & C. BILL OF REVIVOR, 5; PRACTICE, REVIVOR, 1.

RIVER. RIPARIAN OWNER.

1. Appraisers appointed to assess damages to the riparian owner arising from the diversion of the water of the river, should allow to a tenant of a mill (under such owner) the damages he will sustain. *Water Commissioners and Van Cortlandt*, 545.
2. Mode, recommended by the court, of assessing damages in favor of owners of unequal shares in different pieces of land and others on account of the diversion of water of a river. *Id.*
3. Where the main body of water in a river has been controlled by a dam and turned and used by a mill for forty years and the dam and mill were maintained without objection, a perpetual right in such use of the water is thereby gained; unless a qualified right as

- to time is insisted on and proved by the party who attempts to narrow it. Even twenty years of such enjoyment would presume a grant. *Id.*
4. The principles applicable to the use of river water, as stated by the court in *Wright v. Howard*, 1 Sim. & S. 190, recognised as in force here. *Id.*
 5. Where the fee of a mill under lease, using water turned from a river or a mill-site for future mill purposes, is devised with the addition of "with an equal proportion of water out of Croton River Dam," the gift of such proportion of water is as permanent as the gift of the mill. *Id.*
 6. Assessors, acting under statute or by direction of a court to ascertain and report damages due to owners on account of the diversion of water, act properly in hearing evidence of prescription and grant, the better to ascertain rights and apportion accordingly. *Id.*

S

SALE. RESALE.

1. Since the revised statutes, a contract for the sale of lands is not complete unless the seller (personally or by agent lawfully authorized) subscribes the contract. A contract, signed or subscribed by a buyer only, cannot be enforced: the statute requires the seller to sign and is silent as to the purchaser. *Miller v. Pelletier*, 102.
2. Where a resale was obliged to be had owing to the solicitor and master not having attended sufficiently in selling to a description of the premises as contained in the decree, the court refused to the solicitor his costs on the motion discharging former purchasers and to the master his costs and advertising of the first sale. *Walsworth v. Anderson*, 281.

SET OFF.

1. J. G. A., being proprietor of the bank of F., solicited the firm of M. C. & A. for their drafts; and, on obtaining, discounted them, paying in the then current notes of the bank. Subsequently and before the drafts matured and while M. C. & A. still held the greater portion of the bank notes, the bank failed; and J. G. A. assigned its assets; and, amongst them, the drafts to L. H., in trust for creditors. L. H. as holder sued M. C. & A. at law on their drafts at maturity: *Held*, that there was a case of equitable set-off and an injunction should issue to restrain the action at law. *Mel v. Holbrook*, 539.
2. And see, *Davis v. The American Life Insurance and Trust Co.*, 308.

SIMULATED DEVICES.

1. The act of the legislature of the 19th February, 1819, authorized a board of port wardens, under the style of the master and wardens of the port of New York, with a common seal and who should have an office and clerk and power to survey vessels deemed unfit for sea and to judge of their necessary repairs to perform the voyage and to inspect sales of vessels and goods arriving damaged and required to be sold for the benefit of underwriters out of the city of New York and to grant certificates and receive fees and their appointment making them public officers: *Held*, that they had exclusive right to perform the duties specified by the act. And, that an association of persons advertising to survey ships and merchandize, setting up an office close by that of the port wardens

and calling themselves "Marine surveyors for the port of New York, appointed by the chamber of commerce and board of underwriters," and giving out that they performed the same duties as the port wardens and that their acts would be more authentic than those of the port wardens, had no right to execute any of the statutory duties appertaining to the office of the latter. And, *it seems*, they had brought themselves within the principles of the cases connected with simulated devices and deceits. *Tyack v. Bromley*, 258.

SOLICITOR AND CLIENT.

1. Where a client complains that his solicitor, while acting as such, has fraudulently obtained from him a judgment and money thereunder, for unjust fees and charges, the *onus* is thrown upon the solicitor to prove consideration for each and every item. *De Rose v. Fay*, 40.
2. A solicitor, acting for several clients in a matter, must not, *pendente lite*, get one of them to give him security upon that one's estate or rights, for the fees coming to him from another of the clients: unless where the effect and extent of the liability are most distinctly explained. *Id.*
3. An accumulation of costs, arising from a solicitor's spreading litigation by a second suit, while the first is pending, and might, by an amendment or otherwise, be made sufficient, will be disallowed; and, if paid, must be refunded. The client's consenting to the proceedings, by signature and oath to the pleading involved, does not debar him from questioning its propriety. *Id.*
4. A solicitor, while acting as such, should not encourage or allow a client to sign a petition to be presented to the court beneficial to the former. *Id.*
5. A solicitor who is made a defendant, and who desires to protect himself from answering on the ground of confidential communication, must distinctly show that his knowledge and information came solely from his client. He is not exempt, merely because he obtained it while engaged in business for his client. And should he afterwards become the executor of his client and he is made a defendant to reach the property which had been held by such client, the privilege would cease and he must answer in connection with it. *Crosby v. Berger*, 254.
6. In a dealing between solicitor and client involving the property of the latter, the former must place himself in the position of a stranger. He must be able to show that he has cut off, as it were, the connection which bound him to the client; that they have dealt at arms-length; and that nothing has happened which might not have happened had no such connection existed. *Lewis v. J. A.*, 599.
7. Equity interferes to help a client against the effect of a dealing with his lawyer on other ground than fraud. It is done from the fact of there being an inequality arising from confidence on the part of the client. *Id.*
8. A solicitor, who had been long employed by a client, was applied to for the purpose of finding security for money. At first he was not successful; but, afterwards, he suggested having of his own properties, certain "very excellent" bonds and mortgages, but did not describe them or give the names of the mortgagors; and the client, at once, sent word that he could have the money. Whereupon, the solicitor sent his clerk with the bonds and mortgages and assignments thereof duly acknowledged; and the client gave his check. The latter, for some time, received the interest on them. The mortgagors in one or more of the cases had conveyed away the premises, subject to the mortgages. This was particularly the case as to one, where the interest was in arrear at the time the client received

them and the mortgagor was insolvent soon afterwards. The property in this particular mortgage consisted of vacant lots and the ultimate holders at last refused to pay any more interest; and taxes and assessments came in arrear. No fraud was proved. The transaction occurred in February 1838 and the bill for relief was filed in May 1842. *Held*, that the solicitor was bound to take back this bond and mortgage and restore the amount paid for it, with interest, and reimburse prospective payments for taxes and assessments. *Ib.*

9. Radcliff, in 1812, bought and had land conveyed to him by Van Benthuyzen and gave a mortgage back; but did not know of two judgments against the latter. On the 21st January 1831, the attorney of Van Benthuyzen sold the land under the power in the mortgage without any notice, request or demand and on the usual advertisement; and bought in his own name. Radcliff, hearing of the sale, went to Van Benthuyzen, who consented to waive the sale or to allow full value on a settlement. The attorney, by pretence, strengthened his title by a deed of the power of sale from Van Benthuyzen; and, at last, insisted on ownership. Soon after the sale, the attorney obtained control of the two judgments and sold the land and again bought in his own name, without notice or knowledge of Radcliff; but the attorney, as well as Van Benthuyzen, afterwards declared that no advantage thereby should be had against Radcliff. In 1834 a bill was filed by Van Benthuyzen against the attorney, which resulted in a decree and order against the attorney requiring him to convey to Van B., but giving him a lien for any balance due to him. He conveyed on the 17th day of January, 1839. Radcliff had gone into possession from the first and so continued until his death in 1842; and his heirs, the complainants, had followed up such possession. But, now, the attorney proceeded under the aforesaid decree and order to sell for balance alleged to be due from Van Benthuyzen (who was also dead) and the attorney had also put a mortgage on the property: *Held*, on a bill filed by the said heirs of Radcliff to be quieted in possession—to which a demurrer was interposed by the attorney—that an equity had arisen on the original purchase and covenants whereby Radcliff was entitled to be protected against the legal title conveyed by the attorney (under the decree) to Van Benthuyzen; and that this equity arose at the time of the said decree of the 17th of January 1839, and as six years had not transpired since then, that the statute of limitations did not apply. *Radcliff v. Rowley*, 646.

STATUTE.

1. The statute incorporating the Farmers' Loan and Trust Co. (which allowed loans on bond and mortgage) declared that the act should expire at the end of fifteen years, except as to insurance on lives and the granting of annuities. By an act passed shortly before such expiration, a new name was given to the company and its existence (without fresh powers) was thereby continued. After this last act went into effect and after the expiration of the fifteen years, the company advanced on bond and mortgage. And the court *Held* that, as the power to make insurances on lives and the granting of annuities was saved, the company must have funds to apply to them and might invest in order to carry on such business; and, therefore, they were justified in such advance and the same would be presumed to have been done in the ordinary course of its business. *Farmers Loan and Trust Co. v. Clowes*, 575.

STATUTE AGAINST FRAUDULENT CONVEYANCES.

1. Where a husband, immediately after marriage and without consideration, alone executed an instrument of settlement, whereby he released and conveyed to trustees the

wife's real and personal estate: "To hold and keep both the principal and interest thereof during the said marriage, exempt from his debts, contracts or control, to be managed and disposed of on her separate orders or receipts or by her deeds or will, so that she may enjoy and dispose of the same as it came from her parents and sister or may hereafter in any manner accrue to her in all respects as if she were unmarried;" and delivered the same to such trustees: *Held*, that the instrument was valid; that the statute against fraudulent conveyances, in requiring a consideration to be expressed, does not control an instrument which creates and passes the estate, title or interest: that a consideration is here implied by execution; and that a deed like the above is not to be deemed executory, promissory or as a covenant or agreement to do some future act. *Cruger v. Douglas*, 433.

STATUTE OF LIMITATIONS.

1. Before the revised statutes, there was no statute expressly limiting the time to bring suits in equity. Still, a claim, arising before the revised statutes, is affected by them and will run from their passage. The court, on a demurrer which stands upon the statute of limitations, will take official notice of the date of the jurat to the bill. *Lindsay v. Hyatt*, 97.
2. On the 12th of April, 1826, a money-bond was given by an incorporated company, under their seal, payable to J. L. D. or order five months after date. It was assigned to the complainant. The association became insolvent; and the complainant now filed a bill to compel payment from directors and stockholders. On demurrer, *It was held*: that the present was not a claim of a purely equitable character; and that, in this case, the six years mentioned in the statute of limitations (R. S.) within which actions on simple contract are to be brought, applied; and not the ten years therein mentioned: as the defendants could not be sued strictly on the bond, but, if at all, only on the footing of partners or joint dealers contracting a debt. *Id.*
3. Where a will directed co-partnership debts to be paid in the following words: "I order and direct my said executor to pay and divide the same to and among the creditors of the late firm of C. & M'C. of the city of New York, carriers, to whom I, as one of the said firm, may be indebted at the time of my death rateably and proportionally, according to the amount of their several and respective claims and demands, so far forth as he shall be able conveniently to ascertain the same; and with a view to free this subject from all embarrassments, I will and direct that my executor shall cause an advertisement to be inserted for one month in two of the daily papers of the city of New York, notifying the said creditors of this order and direction and that such as come in at the end of the said month and produce their claims, duly authenticated, shall be entitled to their dividends and all others shall be excluded from any participation in the same. All debts of whatever grade to be placed on an equal footing." *Held*, that this did not revive debts otherwise barred by time. *Murray v. Mechanics' Bank*, 567.
4. Where an answer expressly avers a new promise within six years and no replication is filed, the debt will be treated as revived. *Id.*
5. A bill gave C. F. two-thirds of a farm and left to executors the remaining one-third on a trust, subject to a widow's life estate; and directed C. F. and the executors to pay S. F. a legacy of \$300 (and two small legacies) in proportion to the shares of land devised. Also, that if C. F. neglected to pay his proportion, the executors were to sell sufficient to pay. And there was a provision for partition on the mutual consent of widow, executors and devisees. The partition took place; and C. F., at the instance of the acting

executor, gave his bond and mortgage (to such executor) on the two-thirds of land set apart to him, to secure as well the widow her share of the life estate as the proportion of legacies payable by him to the next of kin of S. F. (the legatee, who had died). After this, the widow died; and, then, C. F. paid the executor his proportion of the legacies and the mortgage was cancelled. At this time there was no legal representative of S. F.; and his only child and next of kin was a minor. The executor became insolvent and the legacy was lost. *Held*, as the present action, by S. F.'s next of kin, for such proportion of the legacy of \$900, was not commenced by the legatee's next of kin until six years after the death of the widow of the testator or of the grant of any administration to S. F.'s widow or of the coming of age of such next of kin, that the statute of limitations applied. *Frost v. Frost*, 733.

STATUTE OF USES AND TRUSTS.

1. An instrument is not void under the statute of uses and trusts: 1 R. S. 737 § 25 for, while the words, "*to be managed or disposed of on her separate orders or receipts or by her deeds or will, so that she may enjoy the same in all respects as if she were unmarried,*" would seem to give her all power as if she were a *feme sole* and the trustees be mere nominal parties, yet, when coupled with the words (applying to the trustees) "*to hold and keep both the principal and interest thereof during the said marriage, &c.,*" a requirement to perform active duties appears and makes the trust good. *Cruger v. Douglas*, 433.

STALE DEMAND.

1. The staleness of a known demand creates a suspicion against it. Where a principal witness has promoted a stale claim (eleven years old) and his hostility to the defendant is apparent, his testimony will be far outweighed by an answer fairly responsive to the bill. *Plet v. Boucaud*, 30.

SURETY.

1. A surety of a mortgage is not entitled to any notice or demand before making him a party with a view to fix him. *Rushmore v. Miller*, 84.

And see, HUSBAND AND WIFE, 9, 10. PRINCIPAL AND SURETY, 1, 2, 3, 4, 5, 6, 7.

SURROGATE.

1. Executors of a will of real and personal property had filed no inventory in New York, where part of the personalty was, and one of them was controlling the estate, and a wasting of it was alleged, while their pecuniary inability was stated, and it was suggested that coercive steps were about to be taken in the surrogate's office, (where they had, however, lately given bond on application of the present complainant,) and the bill prayed that the executors be enjoined and also suspended, and a receiver appointed. *The court held*, that the surrogate had full power in the premises, and there were not such special circumstances as made it necessary for this court to interfere on the ground of having concurrent jurisdiction. Preliminary injunction dissolved. *Whitney v. Monroe*, 5.

T

TENANT BY THE CURTESY INITIATE.

1. A tenancy by the curtesy initiate is a sufficient estate in lands upon which to base a partition suit. *Riker v. Darke*, 668.

TENANT FOR LIFE.

1. A widow who has a life estate in property devised to her, (while her husband is alive) cannot be compelled by this court to break into it or to apply the same towards the support of an infant child who will be entitled in remainder. Nor will the court order it out of such, his, future estate. *In the matter of Ryder*, 338.

TENDER. See, MORTGAGE, MORTGAGOR, MORTGAGEE, 4.

TRUST. TRUSTEE.

1. Trustees of an invalid trust who reasonably defended it, but who were cognizant of all the transactions out of which its invalidity arose, decreed to bear their own costs. *Leavitt v. Yates*, 134.
2. Trust deed set aside on the complaint of a receiver, as the court considered the trustees so placed that they could not well do otherwise than defend it; and yet, as the fact was that they were not strangers to the transactions out of which it arose, and accepted the trust knowingly, they were decreed to bear their own costs, and the receiver was allowed his costs out of the fund. *Ib.*
3. A clerk of a bank, through fraud using the borrowed check of a firm, whose account (in that way overdrawn) was more particularly under his own supervision, withdrew money from the bank and deposited it to his own account in another bank and bought stock with it and caused such stock to be placed in the name of his sisters without consideration: *Held*, that the sisters were to be construed as trustees for the bank defrauded. *Bank of America v. Pollock*, 215.
4. A trust need not be clothed in the very words of the statute of trusts; a substantial compliance is sufficient. *Cruger v. Douglas*, 443.
5. Good faith and honest intentions will not protect men in the performance of a trust when they depart from prudential rules which the experience of others in similar transactions have approved as the only safe guides. *Bogart v. Van Velsor*, 718.

And see, ASSOCIATION, 4, 12. LEASE, 2. QUIA TIMET, 1. STATUTE OF USES AND TRUSTS, 1.

U

USURY.

1. An assignor of a mortgage taking, from after-purchasers who buy subject to the mortgage, an additional security and amount for forbearance, will not, thereby, invalidate the original security for usury; but, on foreclosure, he will have to give credit for such addition. *Lovett v. Racey*, 22.
2. Although there may be a defence to an action at law in a matter of usury, yet, a bill will hold to compel the giving up of securities left as collateral security for the usuri-

- ous debt and an injunction will be a consequence to stay the action. *Peters v. Mortimer*, 279.
3. A foreign institution, on an application in New York to loan \$100,000 at seven per cent. on bond and mortgage of property there, agreed to give their certificates to that amount bearing interest at five per cent. and a large portion of them payable in twenty years: such a transaction, it would seem, is usurious. *Stoney v. The American Life Insurance and Trust Company*, 332.
 4. A defendant at law interposed usury and affixed an affidavit to his pleas, with a seeming view to examine the plaintiff under the statute, but such affidavit was not deemed sufficient to meet the views of the act; and a verdict and judgment were had against him: *Held*, that he was too late to come into this court for relief. *Cowan v. Kingsland*, 627.

USES. See, STATUTE OF USES AND TRUSTS, 1.

VENDOR AND VENDEE.

1. Where a person holds a contract for purchase of real estate, and he sells the property and agrees that he will cause to be executed and delivered a good and sufficient warranty deed, the last buyer cannot object on the ground that the title is in another; and he will be bound to take a deed in the name of such other. This case is not within the principle making void purchases where the seller is not a *bona fide* contractor and is speculating with other persons property. *Scott v. Thorp*, 1.
2. Since the revised statutes, a contract for the sale of lands is not complete unless the seller (personally or by agent lawfully authorized) subscribes the contract. A contract, signed or subscribed by a buyer only, cannot be enforced, the statute requires the seller to sign and is silent as to the purchaser. *Miller v. Pelletier*, 102.
3. Where a person buys a portion of lands mortgaged and there is a surplus on foreclosure, he will not be allowed thereout the amount he purchased at, but only as much as his portion contributed to the sale. *Frost v. Peacock*, 678.
4. On a master's sale, the buyer, in equity, becomes the owner from the day the report of sale is confirmed; and the premises are, then, at his risk, even though he has not received a deed. *Gates v. Smith*, 702.
5. A loss by fire, after such confirmation and before deed, falls upon the buyer; but not so where the loss is prior to a confirmation of the master's report. *Ib.*
6. Where, in a partition suit, the buyer is one of the heirs in interest and an insurance has been had of the premises in the names of all the heirs and a fire destroys the buildings on the property after the time of sale as well as after a confirmation of the master's report of sale, but before a conveyance: *Held*, that the buyer, paying his full purchase money, was entitled to the benefit of the policy. *Ib.*

And see, COSTS, 1, 2. EVIDENCE, 1.

VESTED REMAINDER.

1. A grantor gave a leasehold house to a trustee, to receive rents and apply them towards the support of H. C. "And after the death of H. C., I give, grant and convey the aforesaid house to my natural daughter, M. B. M. her heirs and assigns." Here the daughter got a vested remainder assignable and descendable; and on her making a marriage settlement (her future husband joining) whereby the property was secured to the survivor of

them, and the husband survived: *Held*, that he was entitled under the settlement and was not left to his marital rights. *In the matter of Leeffe*, 395.

W

WATER. See, RIVER, RIPARIAN OWNER, MILL, EVIDENCE, 6.

WILL.

1. Testator bequeathed to his brothers, J. and M. and sister M. and their children all his estate, and in case of the death of either of them, to their heirs, to be equally divided among them who shall survive and the children and heirs of the deceased." They all (J. and M. and M. the sister) died before the testator. Both the brothers and sister left children, while one of the sons of the sister had died also leaving children. Held, that these children (the sister's grand-children) were to be let in and took *per capita*. *Murphy v. Harvey*, 131.
2. The word *children* is not to be converted into a word of limitation, except under a necessity in order to carry out a testator's intention. *Ib.*
3. The words to be *equally divided*, when applied to a gift to several persons of different degrees of consanguinity to the testator, supersede the manner of distribution by the statute. *Ib.*
4. A testatrix devised a lot to executors in trust to receive rents until her youngest child attained 21 years of age and apply the rents for the benefit of her two youngest children until \$350 should have been so obtained for each, which amounts were to be placed in the Savings Bank to accumulate until they should attain 21, unless the interest or principal should be necessary for support or education; and after these sums (of \$350) had been set apart, the rents of the lot were to be appropriated to the support of all her children (five) until the youngest became 21, &c.; and, then, to sell the property and divide the proceeds equally among the children share and share alike or among those living and the representatives of those who should be dead, the representatives to take no more than the parent would have taken. The sole acting executor (after nine years of trust) died and this court had appointed a trustee who, on the coming of age of the survivor of the two youngest children, sold the lot. It did not appear whether such executor had laid aside either of the sums of \$350 out of the rents or that its use was wanted for support, &c. Three of the children had died, embracing one of the two youngest, two intestate, but one of the latter left a daughter and the other devising his share under the will to the surviving younger brother: *The Court held*, that \$350 could not now be taken from the purchase money of the lot for the youngest surviving child; and that it was to go in thirds, one third to the daughter of the deceased child and two thirds to the surviving younger brother. *In the matter of Mason*, 418.
5. The place of a testator's residence and death is the place for determining all questions that may arise respecting his personal property and its disposition and distribution, wheresoever it may be situated. *Mills v. Fygal*, 559.
6. But where a will has reference to real estate, all questions as to the will and the estate and its disposition are governed by the *lex rei sitæ*. And if a party dies intestate, leaving real estate, the descent and heirship are exclusively governed by the law where it is situated. *Ib.*
7. Where a will directed co-partnership debts to be paid in the following words: "I order

and direct my said executor to pay and divide the same to and among the creditors of the late firm of C. & M'C. of the city of New York, curriers, to whom I, as one of the said firm, may be indebted at the time of my death rateably and proportionally, according to the amount of their several and respective claims and demands, so far forth as he shall be able conveniently to ascertain the same; and with a view to free this subject from all embarrassments, I will and direct that my executor shall cause an advertisement to be inserted for one month in two of the daily papers of the city of New York, notifying the said creditors of this order and direction and that such as come in at the end of the said month and produce their claims, duly authenticated, shall be entitled to their dividends and all others shall be excluded from any participation in the same. All debts of whatever grade to be placed on an equal footing. *Held*, that this did not revive debts otherwise barred by time. *Murray v. Mechanics' Bank*, 567.

8. Where an answer expressly avers a new promise within six years and no replication is filed, the debt will be treated as revived. *Ib.*
9. H. Z., by his will, gave the rents and profits of his real and personal estate to his wife for life, if she remained his widow; but if not, then, he authorized and empowered his executors to let, sell or dispose of his real estate or such portion as the major part of them should think proper in their discretion and make and execute conveyances; and in case his executors should judge it necessary to sell and dispose of such real estate or any part of it, then, to place the nett proceeds at interest and such interest to be paid to his wife for life. After her death, the then remaining part of his estate, real and personal, was to be converted into cash and placed out at interest for the benefit of his son J. H. Z. and the interest given to him during life. And after wife's death, he gave and devised his estate to the children of his said son. The son died before the widow, leaving two children; and the widow married again and then died. The executors had not sold the real estate, but leased it during the widow's life: *Held*, that the executors had a naked discretionary power, which they used by so leasing during the widow's life; and as the son died in her life time, their power ended with her death: and that which was real estate went, as such, to the son's children and was not, then, to be considered as if converted into personalty. *Slocum v. Slocum*, 613.
10. The testatrix gave to her niece M. P. and to her heirs \$6,000. The legatee died before the testatrix, leaving children. The court held that, observing this clause alone, the legacy lapsed; but, on the paramount rule of looking at the whole will and subjecting the same to examination and comparison, the court decided that the legacy went to the children of the legatee, inasmuch as a prior clause furnished a key for construing the bequest in that way. *Hawn v. Banks*, 664.
11. The words *or* and *and* will be allowed a construction so as to stand in the place of each other in a will when the meaning of the testator, as collected from the whole will, clearly authorizes it; but not otherwise. *Ib.*
12. A testator making his will and dying before the revised statutes (1830) devised houses to his grand-daughter H. "her heirs and assigns to her and their sole and only use for ever." Also, he bequeathed to her some stock; and named a trustee to receive the rents and dividends and apply the same to her education and maintenance until she should attain 21 years or be married and in either of which events "the houses and stock are to be at her own disposal." The devise was followed by these words: "And in case my said grand-daughter shall die without leaving lawful issue, then and in such case I give, devise and bequeath the said houses, &c. to my daughters A. E. and S. their heirs and assigns for ever:" *Held*, that the limitation over was too remote and, therefore,

void; and that the grand daughter H. took and could convey an absolute fee. *Ferris v. Gibson*, 707.

13. A testator gave to his wife during widowhood the use of all the houses and lands that he thereby gave to his daughter J. W: "*Item, I give unto my beloved daughter J. W. my house and lot of land where I now live, which she is to have after her mother's decease or day of marriage, bounded as follows* (describing them by metes and bounds) *containing within said bounds 20 acres more or less. Also one piece of woodland lying near N. bounded* (describing it likewise by metes and bounds) *containing within said bounds 10 acres more or less to her and her heirs for ever after her mother's decease or day of marriage.*" The question was whether the daughter took a fee or life estate in the house and lot as well as in the woodland. *Held*, that she took a fee in both; that there is but one gift although there are two properties and the words "*to her and her heirs for ever*" apply to both of the latter. *Summers v. Burtis*, 728.

WITNESS. See, EVIDENCE; WITNESS.

1. A person who comes into this state for the express and sole purpose of giving testimony as a witness in an action at law, even where he has had no *subpoena* to testify served on him after arrival, cannot be taken on a writ of *ne exeat* while waiting to give evidence. *Dixon v. Ely*, 557.

WORDS.

"Children."

1. The word *children* is not to be converted into a word of limitation, except under a necessity in order to carry out a testator's intention. *Murphy v. Harvey*, 131.

"To be equally divided."

2. The words *to be equally divided*, when applied to a gift to several persons of different degrees of consanguinity to the testator, supersede the manner of distribution by the statute. *Id.*

"Or." "And."

3. The words *or* and *and* will be allowed a construction so as to stand in the place of each other in a will when the meaning of the testator, as collected from the whole will, clearly authorizes it; but not otherwise. *Hawn v. Banks*, 664.

"Assigns." "For ever." "Heirs."

Neither of the words *assigns* nor *for ever* are necessary to carry a fee. The word *heirs* alone will secure it. *Summers v. Burtis*, 728.

And see, DEED, 16.

WRIT. See, NE EXEAT.

END OF VOLUME IV.

Ex. G. A. A.

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